

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

F036
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21173

PACIFIC SEAFARERS, INC., ET AL., *Appellants*,

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Appellees*

Appeal From Order and Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 12 1967

Nathan J. Paulson

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PACIFIC SEAFARERS, INC., ET AL., *Appellants*,

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Appellees*

Appeal From Order and Judgment of the United States
District Court for the District of Columbia

JOINT APPENDIX

Relevant Docket Entries**1966****Nov. 18—Complaint.****1967****Jan. 31—Motion of Defendant Farrell Lines, Inc. to Dismiss for Failure to State Claim.****Jan. 31—Answer of Defendant Moore-McCormack Lines, Inc. to Complaint.****Feb. 7—Motion for Summary Judgment by Defendants Lykes Bros. Steamship Co., Inc., United States Lines Company, Alcoa Steamship Company, Inc., Bloomfield Steamship Company, Central Gulf Steamship Corporation, Prudential Lines, Inc., Stevenson Line, Inc., Stockard Shipping Co., Inc. and Atlantic and Gulf American Flag Berth Operators.****Feb. 20—Answer of Defendant Matson Navigation Company to Complaint.****Feb. 20—Motion of Defendant Waterman Steamship Corporation to Dismiss the Complaint.****Feb. 20—Motion of Defendant American Union Transport, Inc. for Summary Judgment.****Feb. 20—Motion of Defendants Pacific Far East Line, Inc., States Marine Lines, Inc., American President Lines, Ltd., American Mail Line, Ltd., Isthmian Lines, Inc., States Steamship Company and West Coast American Flag Berth Operators to Dismiss the Complaint In Its Entirety.****Feb. 20—Answer of Defendant American Export-Isbrandtsen Lines, Inc. to Complaint.****Mar. 30—Motion of Defendant Matson Navigation Company for Summary Judgment.**

Apr. 14—Motion of Defendant Moore McCormack Co., Inc. for Summary Judgment.

Apr. 21—Points and Authorities of Plaintiffs In Opposition to Motions to Dismiss and Motions for Summary Judgment on the Grounds that the Court Is Without Jurisdiction, with Exhibits 1, 2 and 3 attached.

Apr. 25—Motion of Defendant American Export-Isbrandtsen Lines, Inc. for Summary Judgment and to Dismiss.

May 10—Motion of Defendant Grace Line, Inc. for Judgment As To All Plaintiffs.

May 10—Stipulation of Defendants re Presentation of Oral Argument.

June 9—Order Dismissing Complaint In Its Entirety.

June 23—Transcript of Proceedings, June 2, 1967.

June 27—Notice of Appeal by Plaintiffs from Order of June 9, 1967.

(Filed November 18, 1966)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3088-66

PACIFIC SEAFARERS, INC.
6925 Eliot Avenue
Middle Village, N. Y. 11379

SEAFARERS, INC.
6925 Eliot Avenue
Middle Village, N. Y. 11379

GREAT LAKES BENGAL LINES, INC.
6925 Eliot Avenue
Middle Village, N. Y. 11379

MID-AMERICA STEAMSHIP CORP.
6925 Eliot Avenue
Middle Village, N. Y. 11379

J. J. GEORGELIS, INC.
6925 Eliot Avenue
Middle Village, N. Y. 11379
Plaintiffs

v.

PACIFIC FAR EAST LINE, INC.
918 - 16th Street, N. W.
Washington, D. C.

STATES MARINE LINES, INC.
1130 - 17th Street, N. W.
Washington, D. C.

AMERICAN PRESIDENT LINES, LTD.
1101 - 17th Street, N. W.
Washington, D. C.

WATERMAN STEAMSHIP CORPORATION
910 - 17th Street, N. W.
Washington, D. C.

AMERICAN EXPORT-ISBRANDTSEN LINES, INC.
2000 K Street, N. W.
Washington, D. C.

AMERICAN MAIL LINE, LTD.
1616 H Street, N. W.
Washington, D. C.

ISTHMIAN LINES, INC.
1130 - 17th Street, N. W.
Washington, D. C.

LYKES BROS. STEAMSHIP CO., INC.
1741 De Sales Street, N. W.
Washington, D. C.

STATES STEAMSHIP COMPANY
Cafritz Building
Washington, D. C.

UNITED STATES LINES COMPANY
1000 Connecticut Avenue, N. W.
Washington, D. C.

ALCOA STEAMSHIP COMPANY, INC.
Ring Building
Washington, D. C.

AMERICAN UNION TRANSPORT, INC.
Cafritz Building
Washington, D. C.

BLOOMFIELD STEAMSHIP COMPANY
1130 - 17th Street, N. W.
Washington, D. C.

CENTRAL GULF STEAMSHIP CORPORATION
1333 G Street, N. W.
Washington, D. C.

FARRELL LINES, INC.
1101 - 17th Street, N. W.
Washington, D. C.

GRACE LINE, INC.
1511 K Street, N. W.
Washington, D. C.

KULUKUNDIS MARITIME INDUSTRIES, INC.
80 Broad Street
New York, New York

MATSON NAVIGATION COMPANY
1001 Connecticut Avenue, N. W.
Washington, D. C.

MOORE-McCORMACK LINES, INC.
1000 - 16th Street, N. W.
Washington, D. C.

PRUDENTIAL LINES, INC.
1750 Pennsylvania Avenue, N. W.
Washington, D. C.

STEVENSON LINE, INC.
711 - 14th Street, N. W.
Washington, D. C.

STOCKARD SHIPPING CO., INC.
Cafritz Building
Washington, D. C.

ATLANTIC AND GULF AMERICAN FLAG
BERTH OPERATORS
80 Broad Street
New York, N. Y.

WEST COAST AMERICAN FLAG
BERTH OPERATORS
7 Front Street
San Francisco, California
Defendants

Complaint for Damages Under the Antitrust Laws

Jurisdiction and Venue

1. This action is brought under Section 4 of the Clayton Act (15 USC § 15) to recover damages for injuries to the business and property of the plaintiffs resulting from defendants' violations of Sections 1, 2 and 3 of the Sherman Act (15 USC §§ 1, 2 and 3) as hereinafter alleged.
2. Each of the corporate defendants is found or has an agent or transacts business in the District of Columbia.

Plaintiffs

3. Plaintiff Pacific Seafarers, Inc. (hereinafter referred to as "PSI") is a corporation organized under the laws of the State of New York with its principal place of business at 6925 Eliot Avenue, Middle Village, New York. At all

times material hereto, it operated an ocean common carrier service, primarily devoted to carriage of cement, fertilizer and other cargoes shipped at the expense of the United States from Taiwan and Thailand to South Vietnam.

4. Plaintiff Seafarers, Inc. (hereinafter referred to as "Seafarers") is a corporation organized under the laws of the State of New York with its principal place of business at 6925 Eliot Avenue, Middle Village, New York. At all times material hereto, it was engaged in operating an ocean contract carrier business.

5. Plaintiff Great Lakes Bengal Lines, Inc. (hereinafter referred to as "Great Lakes Bengal") is a corporation organized under the laws of the State of New York with its principal place of business at 6925 Eliot Avenue, Middle Village, New York. At all times material hereto, it operated an ocean carrier service out of the Great Lakes to the Red Sea, Persian Gulf, India and Pakistan, and other Far East ports.

6. Plaintiff Mid-America Steamship Corp. (hereinafter referred to as "Mid-America") is a corporation organized under the laws of the State of New York with its principal place of business at 6925 Eliot Avenue, Middle Village, New York. At all times material hereto, it was engaged in the operation of an ocean contract carrier business.

7. Plaintiff J. J. Georgelis, Inc. is a corporation organized under the laws of the State of New York with its principal place of business at 6925 Eliot Avenue, Middle Village, New York. At all times material hereto, it served as managing agency for the other plaintiffs.

Defendants

8. Defendant Pacific Far East Line, Inc. (hereinafter sometimes referred to as "PFEL") is a corporation organized under the laws of the State of Delaware.

9. Defendant States Marine Lines, Inc. (hereinafter sometimes referred to as "States Marine") is a corporation organized under the laws of the State of Delaware.

10. Defendant American President Lines, Ltd. (hereinafter sometimes referred to as "APL") is a corporation organized under the laws of the State of Delaware.

11. Defendant Waterman Steamship Corporation (hereinafter sometimes referred to as "Waterman") is a corporation organized under the laws of the State of Alabama.

12. Defendant American Export-Isbrandtsen Lines, Inc. (hereinafter sometimes referred to as "American Export-Isbrandtsen") is a corporation organized under the laws of the State of New York. It is the successor in interest of two corporations: Isbrandtsen Company, Inc. and American Export Lines, Inc.

13. Defendant American Mail Line, Ltd. (hereinafter sometimes referred to as "American Mail") is a corporation organized under the laws of the State of Delaware.

14. Defendant Isthmian Lines, Inc. (hereinafter sometimes referred to as "Isthmian") is a corporation organized under the laws of the State of Delaware.

15. Defendant Lykes Bros. Steamship Co., Inc. (hereinafter sometimes referred to as "Lykes") is a corporation organized under the laws of the State of Louisiana.

16. Defendant States Steamship Company (hereinafter sometimes referred to as "States Steam") is a corporation organized under the laws of the State of Nevada.

17. Defendant United States Lines Company (hereinafter sometimes referred to as "U. S. Lines") is a corporation organized under the laws of the State of New York.

18. Defendant Alcoa Steamship Company, Inc. (hereinafter sometimes referred to as "Alcoa") is a corporation organized under the laws of the State of New York.

19. Defendant American Union Transport, Inc. (hereinafter sometimes referred to as "AUT") is a corporation organized under the laws of the State of New York.
20. Defendant Bloomfield Steamship Company (hereinafter sometimes referred to as "Bloomfield") is a corporation organized under the laws of the State of Louisiana.
21. Defendant Central Gulf Steamship Corporation (hereinafter sometimes referred to as "Central Gulf") is a corporation organized under the laws of the State of Delaware.
22. Defendant Farrell Lines, Inc. (hereinafter sometimes referred to as "Farrell") is a corporation organized under the laws of the State of New York.
23. Defendant Grace Line, Inc. (hereinafter sometimes referred to as "Grace") is a corporation organized under the laws of the State of Delaware.
24. Defendant Kulukundis Maritime Industries, Inc. (hereinafter sometimes referred to as "Kulukundis") is a corporation organized under the laws of the State of New York.
25. Defendant Matson Navigation Company (hereinafter sometimes referred to as "Matson") is a corporation organized under the laws of the State of California.
26. Defendant Moore-McCormack Lines, Inc. (hereinafter sometimes referred to as "Mormac") is a corporation organized under the laws of the State of Delaware.
27. Defendant Prudential Lines, Inc. (hereinafter sometimes referred to as "Prudential") is a corporation organized under the laws of the State of New York.
28. Defendant Stevenson Line, Inc. (hereinafter sometimes referred to as "Stevenson") is a corporation organized under the laws of the State of Delaware.

29. Defendant Stockard Shipping Co., Inc. (hereinafter sometimes referred to as "Stockard") is a corporation organized under the laws of the State of New York.

30. Defendant Atlantic and Gulf American-Flag Berth Operators (hereinafter referred to as "AGAFBO") is a conference of American-flag berth operators serving worldwide from and to United States Atlantic and Gulf ports, organized, with the approval of the Federal Maritime Commission, to negotiate with the Military Sea Transport Service (hereinafter referred to as "MSTS") of the Department of Defense. By the terms of the AGAFBO agreement on file with the Federal Maritime Commission, its activities are limited exclusively to MSTS and military cargoes. Its authority does not extend to Agency for International Development (hereinafter referred to as "AID") cargoes or shipments. AGAFBO transacts business in the District of Columbia.

31. Defendant West Coast American-Flag Berth Operators (hereinafter referred to as "WCAFBO") is a conference of American-flag berth operators serving worldwide from and to United States West Coast ports, organized, with the approval of the Federal Maritime Commission, to negotiate with MSTS of the Department of Defense. By the terms of the WCAFBO agreement on file with the Federal Maritime Commission, its activities are limited exclusively to MSTS and military cargoes. Its authority does not extend to AID cargoes or shipments. WCAFBO transacts business in the District of Columbia.

32. Defendants States Marine, APL, Waterman, American Export-Isbrandtsen, Isthmian, Lykes, States Steam, U. S. Lines, Alcoa, AUT, Bloomfield, Central Gulf, Farrell, Grace, Kulukundis, Matson, Mormac, Prudential, Stevenson and Stockard were, at all times material herein, members of AGAFBO.

33. Defendants PFEL, States Marine, APL, Waterman, American Mail, American Export-Isbrandtsen, Isthmian,

States Steam and Matson were, at all times material herein, members of WCAFBO.

34. As used in this complaint, "defendant" includes each of the corporations named above and any predecessor in interest of any of them.

Nature of the Trade and Commerce Involved

35. Each of the corporate defendants is a common carrier by water engaged in the transportation of property to and from various ports in the United States and ports in other countries. Defendants PFEL, States Marine, APL, Waterman, American Export-Isbrandtsen, American Mail, Isthmian, Lykes, States Steam and U. S. Lines are engaged in the transportation of property to and from various ports in the United States and the Far East. As part of their service between the United States and the Far East said defendants pick up cargo at Far East ports and unload it at other Far East ports. This part of their service is sometimes referred to as the Far East interport trade. It is an integral part of their service to and from the United States. All of them employ American crews hired in the United States. The provisioning and repair of their vessels is done primarily in the United States. The vessels of defendants participating in the Far East interport trade begin and end their voyages in the United States.

Most of the defendants are Government-subsidized lines, receiving operating differential subsidies from the United States government. Most of them have received construction-differential subsidies from the United States government for building vessels in United States shipyards.

36. There is and has been at all times material herein a substantial amount of interport traffic in the Far East the funds for which are provided by the United States government, such funds being provided for both the cargoes and the freight. The greatest part of such funds are provided by AID. By statute, regulation and directive the carriage

of this cargo has been reserved almost entirely for American-flag lines.

37. Since May, 1959 defendants PFEL, States Marine, APL, Waterman, American Export-Isbrandtsen, American Mail, Isthmian, Lykes, States Steam, and U. S. Lines have been parties to an agreement fixing the rates applicable to Far East interport cargo shipped at the expense of the United States. This rate agreement was issued and published under the name of an organization known as American-Flag Berth Operators (hereinafter referred to as "AFBO"), in which all of such defendants were listed as members. The rates established by this agreement were followed and adhered to by such defendants in the carrying of cargo in the Far East interport portion of their trade from and to the United States. Such rate agreement was neither submitted to nor approved by the Federal Maritime Commission.

38. In 1962 plaintiffs PSI and Seafarers entered into the Far East interport trade, providing a service which was based primarily on the transportation of AID cargoes from Taiwan and Thailand to South Vietnam. Cement and fertilizer were the basic cargoes upon which this service was built, but plaintiffs also carried substantial quantities of AID general cargoes as well. The funds for the transportation of such cargoes, as well as for the cargoes themselves, were provided by the United States government.

Plaintiffs PSI and Seafarers operated only American-flag vessels, manned by American crews hired in the United States. Plaintiffs maintained offices and a staff in New York City, from which all of their operations were managed and directed, including all arrangements for financing, insurance, fuel supplies, maintenance and repairs. When repairs to plaintiffs' vessels were required, the work was done principally in the United States.

39. The trade and commerce of both plaintiffs and defendants described above is part of the foreign commerce of the United States.

Violations Alleged

40. Beginning at least as early as 1962 and continuing thereafter until the filing of this complaint, defendants have engaged in a combination and conspiracy in restraint of trade and commerce in violation of Sections 1 and 3 of the Sherman Act (15 USC §§ 1 and 3) and a combination and conspiracy to monopolize trade and commerce in violation of Section 2 of the Sherman Act (15 USC § 2).

41. Such combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants (1) to monopolize the Far East inter-port portion of their trade, the funds for which are provided by the United States government, for the benefit of defendants PFEL, States Marine, APL, Waterman, American Export-Isbrandtsen, American Mail, Isthmian, Lykes, States Steam and U. S. Lines, (2) to eliminate therefrom all competition from others, particularly the competition of plaintiffs PSI and Seafarers and (3) to obtain for such defendants the highest possible amount of AID funds through the perpetuation and maintenance of the rate-fixing agreement referred to in Paragraph 37 hereof.

42. Pursuant to such combination and conspiracy defendants did the following things, among others:

A. When it became apparent that plaintiff PSI was establishing a regular service between Taiwan, Thailand and South Vietnam, they attempted to have a directive issued limiting AID shipments in the area to American-flag "conference liners". Though plaintiff PSI was operating a "liner" service (i.e., a common carrier, regularly scheduled service) in the area, it was not a member of any "conference" there and, therefore, its

vessels could not qualify as "conference liners". Indeed, at that time there was no approved "conference" of American-flag berth or liner operators serving the Taiwan-Thailand-South Vietnam trade. Despite this the defendants succeeded in having the limitation put into effect. In an effort to comply with this requirement, plaintiff PSI applied for membership in AGAFBO. Upon being accepted as a member, it was permitted to participate in the transportation of AID cement and other cargoes to South Vietnam and was successful in competing with defendants for such business during the fourth quarter of 1962.

B. Because of plaintiff PSI's success in competing with said defendants for this business, they renewed their efforts to have it declared ineligible to participate in the transportation of AID cargoes in the Far East interport trade. As a result of the concerted efforts of the defendants, the Director General of Commerce of South Vietnam issued a circular on February 8, 1963 to all representatives of cement suppliers in Saigon directing that all future AID cement shipments to South Vietnam be on liners operated by members of AFBO. Plaintiff PSI was not a member of AFBO, though it had been advised by the secretary of AGAFBO that membership in AGAFBO carried with it membership in AFBO and had been receiving communications and circulars distributed to AFBO members. When the Director General's February 8, 1963 circular was brought to the attention of AID officials in Washington, he was advised by them that AID recognized no distinction between conference and non-conference carriers. The Director General thereupon withdrew his directive and plaintiff PSI was permitted to continue to participate in the transportation of AID cement and other cargoes to South Vietnam and again was successful in competing with defendants for such business during the first quarter of 1963.

C. As a condition to its continued participation in such business, plaintiff PSI was advised by the Director General

that it must become a member of WCAFBO. To comply with this requirement, PSI applied for membership in WCAFBO. The secretary of WCAFBO advised PSI that this conference was organized to negotiate with MSTS and that PSI was ineligible for membership because it did not have an MSTS contract. No similar eligibility requirement for membership in AGAFBO had been imposed on PSI, though the pertinent membership requirements of the two organizations were the same.

PSI thereupon applied to the Department of Defense for an MSTS contract. The secretary of WCAFBO sent a telegram to MSTS on behalf of defendants American Mail, APL, Isthmian, PFEL, States Marine, States Steam and Waterman protesting the award of an MSTS contract to PSI on the ground that it was a tramp operator not offering regular flag berth service. This statement was, and was known by said defendants to be, false and untrue at the time it was made. Despite the protest, PSI was approved for an MSTS contract and, shortly thereafter, was admitted to membership in WCAFBO.

D. When the above concerted efforts of the defendants to drive plaintiffs PSI and Seafarers out of the Far East interport trade failed, more drastic concerted action to achieve that result was resorted to, i.e., predatory price-cutting. As previously stated, defendants PFEL, States Marine, American President, Waterman, American Export-Isbrandtsen, AML, Isthmian, Lykes, States Steam and U. S. Lines were parties to a rate-fixing agreement that was applicable to Far East interport shipments transported at the expense of the United States. Under this agreement the rate on cement from Taiwan to South Vietnam was \$8.95 per long ton. For the purpose of driving plaintiffs PSI and Seafarers out of business, such defendants agreed to "open" the rates on cement and fertilizer, the two commodities essential to the continuance of plaintiffs' service, while maintaining defendants' agreed-upon rates on other products and commodities, many of which were

either not carried by plaintiffs or, if carried, were of comparatively lesser importance. The "opening" of the rates was immediately followed by a reduction in the long ton rate on cement from Taiwan to South Vietnam from \$8.95 to \$5.50; and by a subsequent reduction to \$4.96. These drastically reduced rates were so unreasonably low as to insure that if plaintiffs continued to carry cement and fertilizer as they had in the past they would incur substantial losses and be forced to abandon the trade.

This drastic and predatory rate-cutting accomplished its purpose. By reason thereof, plaintiffs PSI and Seafarers first reduced their sailings and, later, had to abandon the Far East interport trade altogether. After said plaintiffs were driven out of business, the defendants who were parties to the AFBO rate-fixing agreement reinstated the cement and fertilizer rates to their former levels and, subsequently, substantially increased them.

43. The services, organization and personnel of AGAFBO and WCAFBO were used to effectuate the combination and conspiracy described above. All of the corporate defendants are members of either AGAFBO or WCAFBO, or both. All of such corporate defendants consented to and acquiesced in the use of the services, organization and personnel of AGAFBO and WCAFBO for such purpose and thereby participated in, and contributed to the effectuation of, the conspiracy.

44. The Federal Maritime Commission has determined that it is without jurisdiction in the matter.

Effects on Plaintiffs

45. As a direct result of the activities of the defendants described above, plaintiffs PSI and Seafarers were driven out of business. Their offices in New York were closed, their employees dismissed, their contracts for services and supplies cancelled. The basic objective of the combination and conspiracy was thereby fully achieved, i.e., two

American companies were eliminated as competitors of other American companies in the transportation of goods paid for by the United States government.

46. During the period from July, 1962 through May, 1963 the operations of plaintiffs PSI and Seafarers had been profitable; and, but for the activities of defendants described above, would have continued to be profitable.

47. At all times material herein, the financial well-being of PSI and Seafarers was the keystone to the financial well-being of the other plaintiffs. PSI, Seafarers, Great Lakes Bengal and Mid-America chartered, leased, and otherwise exchanged vessels among themselves; they made loans and pledged credit among themselves and with others in order to finance their respective business transactions. When PSI and Seafarers were forced out of business, the other plaintiffs, including J. J. Georgelis, Inc. were likewise forced out of business as a result thereof.

Damages

48. As a result of the combination and conspiracy described above, plaintiff PSI sustained damages in the amount of \$3,000,000; plaintiff Seafarers sustained damages in the amount of \$2,000,000; plaintiff J. J. Georgelis, Inc. sustained damages in the amount of \$1,000,000; Plaintiff Great Lakes Bengal sustained damages in the amount of \$1,000,000; and plaintiff Mid-America sustained damages in the amount of \$500,000.

Prayer

WHEREFORE:

1. Plaintiff Pacific Seafarers, Inc. prays that judgment be entered in its favor for treble the amount of its damages, i.e., in the amount of \$9,000,000, together with the costs of this suit, including a reasonable attorney's fee.
2. Plaintiff Seafarers, Inc. prays that judgment be entered in its favor for treble the amount of its damages,

i.e., in the amount of \$6,000,000, together with the costs of this suit, including a reasonable attorney's fee.

3. Plaintiff J. J. Georgelis, Inc. prays that judgment be entered in its favor for treble the amount of its damages, i.e., in the amount of \$3,000,000, together with the costs of this suit, including a reasonable attorney's fee.

4. Plaintiff Great Lakes Bengal Lines, Inc. prays that judgment be entered in its favor for treble the amount of its damages, i.e., in the amount of \$3,000,000, together with the costs of this suit, including a reasonable attorney's fee.

5. Plaintiff Mid-America Steamship Corp. prays that judgment be entered in its favor for treble the amount of its damages, i.e., in the amount of \$1,500,000, together with the costs of this suit, including a reasonable attorney's fee.

6. That plaintiffs be granted such other and further relief as to the Court may seem just and proper.

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(Filed January 31, 1967)

**Motion of Farrell Lines, Inc. to Dismiss for Failure
to State a Claim**

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, defendant Farrell Lines, Inc. moves that this Court dismiss the action as to said defendant because the Complaint for Damages Under the Antitrust Laws fails to state a claim against said defendant upon which relief can be granted.

By its attorneys,

CLARENCE I. PETERSON

Clarence I. Peterson

VERNE W. VANCE, JR.

Verne W. Vance, Jr.

1625 Eye Street, N.W.

Washington, D. C. 20006

January 31, 1967

(Filed January 31, 1967)

Answer of Defendant Moore and McCormack Co., Inc.

Defendant Moore and McCormack Co., Inc. (formerly Moore-McCormack Lines, Inc.), by its attorney, answers the complaint herein as follows:

First Defense

For admissions and denials of the allegations of the complaint,

1. Answering paragraph 1, defendant states that the allegations thereof are conclusions of law, requiring neither admission nor denial.

2. Answering paragraph 2, defendant denies the allegations thereof insofar as they relate to this defendant, and avers that it is without knowledge or information sufficient

to form a belief as to the truth of the allegations thereof insofar as they relate to the other parties.

3. Answering paragraphs 3 through 25, defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations thereof.

4. Answering paragraph 26, defendant admits the allegations thereof, and avers that its corporate name has been changed to Moore and McCormack Co., Inc.

5. Answering paragraphs 27, 28, and 29, defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations thereof.

6. Answering paragraph 30, defendant admits that AGAFBO is a conference of American-flag berth operators operating pursuant to Agreement No. 8086, as amended, on file with and approved by the Federal Maritime Commission; refers to that agreement and the Commission's order of approval of that agreement for their terms; and denies all other allegations contained in paragraph 30.

7. Answering paragraph 31, defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations thereof.

8. Answering paragraph 32, defendant admits that it was a member of AGAFBO from the time of that association's inception until February 28, 1965, and avers that defendant is without knowledge or information sufficient to form a belief as to the truth of any of the remaining allegations thereof.

9. Answering paragraph 33, defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations thereof.

10. Answering paragraph 34, defendant states that the allegations thereof are either definitions of terms or imply conclusions of law, or both, and require neither admission nor denial.

11. Answering paragraph 35, defendant admits that at all times material herein until February 28, 1965, it was a common carrier by water engaged in the transportation of property to and from various ports in the United States and ports in other countries, and received an operating-differential subsidy from the United States Government; avers that a construction-differential subsidy has been paid to shipyards by the United States in connection with defendant's vessels; and further avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the remaining allegations contained in paragraph 35.

12. Answering paragraphs 36, 37, and 38, defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

13. Answering paragraphs 39, 40, and 41, defendant denies each and every allegation thereof.

14. Answering paragraph 42(A), defendant admits that plaintiff PSI applied for and was admitted to membership in AGAFBO; denies that it competed with plaintiffs for the transportation of AID cargo to South Vietnam or any other cargoes or business during the fourth quarter of 1962 or at any other time, and avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in paragraph 42(A).

15. Answering paragraph 42(B), defendant denies that it made or renewed any effort to have plaintiff PSI declared ineligible to participate in the transportation of AID

cargoes or any other cargoes, or business in the Far East interport trade or any other trade, and avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in paragraph 42(B).

16. Answering paragraph 42(C), defendant admits that plaintiff PSI was not required to have an MSTS contract as a requirement for membership in AGAFBO, and avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in paragraph 42(C).

17. Answering paragraph 42(D), defendant denies that it made any efforts, concerted or otherwise, to drive plaintiffs PSI or Seafarers, or anyone else out of the Far East interport trade or any other trade; denies that it engaged in price-cutting, predatory or otherwise; and avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in paragraph 42(D).

18. Answering paragraph 43, defendant denies each and every allegation thereof except that defendant admits that it was a member of AGAFBO until February 28, 1965.

19. Answering paragraph 44, defendant avers that the Federal Maritime Commission on March 17, 1965, dismissed the complaint in proceedings before it known as Docket No. 1104, *Pacific Seafarers, Inc. v. Atlantic & Gulf American-Flag Berth Operators*, et al., and states that each and every other allegation contained in paragraph 44 is a conclusion of law, requiring neither admission nor denial.

20. Answering paragraph 45, defendant denies each and every allegation thereof.

21. Answering paragraph 46, defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that the operations of plaintiffs PSI and Seafarers were profitable during the period from July, 1962 through May, 1963, and denies each and every other allegation contained in paragraph 46.

22. Answering paragraph 47, defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained therein.

23. Answering paragraph 48, defendant denies each and every allegation contained therein.

24. Except to the extent expressly admitted herein, defendant denies the allegations of the complaint and puts plaintiffs to their proof.

Second Defense

25. The complaint fails to state a claim against defendant upon which relief can be granted.

Third Defense

26. This Court lacks jurisdiction over the subject matter of the matters alleged in the complaint.

Fourth Defense

27. The matters alleged in the complaint are exempt from the antitrust laws. Specifically, defendant denies that it took or concurred in any action of any nature alleged in the complaint, and avers that if any action was taken by AGAFBO without the concurrence of this defendant such action was taken pursuant to agreements which at all material times have been on file with and approved by the Federal Maritime Commission.

Fifth Defense

28. The rights of action, if any, set forth in the complaint did not accrue within four years next before the commencement of this action.

Sixth Defense

29. Defendant has at no time material to the complaint been engaged in or in any way interested in the Far East interport trade. Defendant, at all times material herein until February 28, 1965, offered common carrier services and sailings only on certain Essential United States Foreign Trade Routes. Those trade routes (numbers 1, 4, 6, 5-7-8-9, 1'A, 23 and 24) embraced ports on four continents—North America, South America, Europe, and Africa—but in no way did those services or sailings involve, nor did they have any effect upon, the Far East interport trade. Defendant is not and has never been a member of WCAFBO or AFBO, nor of any conference or agreement concerned with the Far East interport trade and publishes no rates and offers no service in that trade. Defendant has no knowledge of any conspiracy or agreement to fix rates in or to monopolize that trade.

Seventh Defense

30. The matters alleged in the complaint are within the exclusive primary jurisdiction of the Federal Maritime Commission.

Eighth Defense

31. Defendant is not an inhabitant of, is not found and does not transact business in this judicial district; hence, this judicial district is not the proper venue of this action.

WHEREFORE, defendant Moore and McCormack Co., Inc., having fully answered the complaint, demands judgment dismissing the complaint as against it, together with its

costs and disbursements and such other and further relief as this court may find just and proper.

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J. Franklin Fort
Kominers & Fort
529 Tower Building
Washington, D. C. 20005
Attorney for Defendant
Moore and McCormack Co., Inc.

DEFENDANT DEMANDS A TRIAL BY JURY OF ALL ISSUES

J. FRANKLIN FORT
J. Franklin Fort

(Filed February 7, 1967)

Motion of Below-Named Defendants for Summary Judgment;
Motion of AGAFBO to Quash Service of Process and Dismiss for Improper Venue: Motion of Below-Named Defendants to Dismiss for Improper Venue, and Motion to Dismiss as to Plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp., and J. J. Georgelis Inc. for Failure to State a Claim

I.

Defendants, Lykes Bros. Steamship Co., Inc., United States Lines Company, Alcoa Steamship Company, Inc., Bloomfield Steamship Company, Central Gulf Steamship Corporation, Prudential Lines Inc., Stevenson Line, Inc., Stockard Shipping Co., Inc. and Atlantic & Gulf American-Flag Berth Operators move this Court to enter Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, in favor of these defendants dismissing the action on the ground that there is no genuine issue as

to any material fact and that these defendants are entitled to a judgment as a matter of law.

* * *

ELMER C. MADDY
RONALD A. CAPONE

Attorneys for Defendants

Lykes Bros. Steamship Co., Inc.,
United States Lines Company,
Alcoa Steamship Company, Inc.,
Bloomfield Steamship Company,
Central Gulf Steamship Corporation,
Prudential Lines, Inc.,
Stevenson Line, Inc.,
Stockard Shipping Co., Inc.,
Atlantic & Gulf American-Flag
Berth Operators,
120 Broadway
New York, N. Y. 10003
and
Farragut Building
900 17th Street, N. W.
Washington, D. C. 20006

Of Counsel:

KIRLIN, CAMPBELL & KEATING
120 Broadway
New York, New York 10005
and
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Washington, D. C. 20006

Note: Exhibit A attached to above motion is the same as Exhibit C attached to the Motion to Dismiss filed by

Defendants Pacific Far East Line, Inc., et al, and Exhibit B attached to above motion is the same as Exhibit B attached to the Pacific Far East motion. To avoid duplication, both exhibits are printed herein following the Pacific Far East motion.

**Statement of Material Facts Pursuant to District Court
Rule 9(h)**

The moving parties to the motions for summary judgment contend there is no genuine issue as to the following material facts:

1. Plaintiffs complaint is based upon the service of Pacific Seafarers, Inc. and Seafarers in the Far East interport trade between Taiwan, Thailand and South Vietnam.
2. Defendants Alcoa Steamship Company, Inc., Bloomfield Steamship Company, Central Gulf Steamship Corporation, Prudential Lines, Inc., Stevenson Line Inc., and Stockard Shipping Co., Inc. were made defendants in this action solely because of their membership in AGAFBO.
3. Pacific Seafarers Inc. joined AGAFBO.
4. Stockard Shipping Company, Inc. is not and never has been a member of AGAFBO. Stockard Shipping Company, Inc. signed the AGAFBO agreement solely on

behalf of its agents and disclosed this fully by the manner in which it signed.

ELMER C. MADDY
RONALD A. CAPONE

Attorneys for Defendants,

Lykes Bros. Steamship Co., Inc.,
United States Lines Company,
Alcoa Steamship Company, Inc.,
Bloomfield Steamship Company,
Central Gulf Steamship
Corporation,
Prudential Lines, Inc.,
Stevenson Line, Inc.,
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(Filed February 20, 1967)

**Answer of Defendant Matson Navigation Company to
Complaint Under the Antitrust Laws**

Comes now Matson Navigation Company, one of the defendants herein, and for its answer to the complaint says:

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

Plaintiff may not maintain this suit because this Court lacks jurisdiction over the subject matter of the complaint.

THIRD DEFENSE

Further answering the complaint, but without waiver of the defenses asserted hereinabove, defendant says:

1. Answering the allegations in paragraphs 1 and 2 of the complaint, defendant denies the allegations in paragraph 1 of the complaint that the plaintiffs, jointly or separately, have a cause of action against defendant; but, admits that, if such cause did exist, then venue as to this defendant would be properly laid as alleged in paragraph 2 of the complaint.
2. Defendant neither admits nor denies the allegations contained in paragraphs 3 through 24 of the complaint and avers that it is without sufficient knowledge or information to form a belief as to the truth of such allegations.
3. Defendant admits the allegations contained in paragraph 25 of the complaint.
4. Defendant neither admits nor denies the allegations contained in paragraphs 26 through 29 of the complaint and avers that it is without sufficient knowledge or in-

formation to form a belief as to the truth of such allegations.

5. Answering the allegations contained in paragraph 30 of the complaint, defendant admits that at the time of its cancellation of its associate membership in the Federal Maritime Commission approved "AGAFBO" Agreement No. 8086 at the end of 1965, that agreement related solely to the collective negotiation of rates and terms with MSTS and related shippers services, and discussions and agreements between the parties with respect thereto. Defendant neither admits nor denies the remaining allegations contained in paragraph 30 of the complaint and avers that it is without sufficient knowledge or information to form a belief as to the truth of such allegations.

6. Answering the allegations contained in paragraph 31 of the complaint, defendant admits that the Federal Maritime Commission approved "WCAFBO" Agreement No. 8186, in which defendant is an associate party, relates solely to the collective negotiation of rates and terms with MSTS and related shipper services, and discussions and agreements between the parties with respect thereto. Defendant neither admits nor denies the remaining allegations contained in paragraph 31 of the complaint and avers that it is without sufficient knowledge or information to form a belief as to the truth of such allegations.

7. Answering the allegations of paragraphs 32 and 33 of the complaint, defendant denies that it has ever been a "member" of either AGAFBO or WCAFBO and avers that it was an "associate member" of the AGAFBO Agreement No. 8086 for the period of 1962 through 1965 and, at all times material to this complaint, has been an "associate party" to the WCAFBO Agreement No. 8186.

8. Defendant neither admits nor denies the allegations in paragraph 34 of the complaint, and avers that such alle-

gations are definitions of terminology employed in the complaint requiring no answer.

9. Answering the allegations contained in paragraph 35 of the complaint, defendant denies that it is engaged in the transportation of property between any port in the United States and any port in any other country, denies that it has received either operating-differential subsidies or construction-differential subsidies from the United States government, and neither admits nor denies the remaining allegations contained in paragraph 35 of the complaint for the reason that it is without sufficient knowledge or information to form a belief as to the truth of such allegations.

10. Defendant neither admits nor denies the allegations contained in paragraphs 36, 37 and 38 of the complaint and avers that it is without sufficient knowledge or information to form a belief as to the truth of such allegations.

11. Defendant denies the allegations contained in paragraphs 39, 40 and 41 of the complaint.

12. Answering the allegations contained in paragraph 42 of the complaint, defendant denies that it did any of the things described in subparagraphs A, B, C or D of paragraph 42 as having been done by defendants, either pursuant to the alleged combination and conspiracy or otherwise; and defendant specifically denies (1) that it has at any time participated in the transportation of AID cement or other cargoes to South Vietnam, either in competition with plaintiff PSI or otherwise, as alleged in subparagraph A, (2) that it made any efforts, at any time, to have plaintiff PSI declared ineligible to participate in the transportation of AID cargoes in the Far East interport trade, as alleged in subparagraph B or (3) that it made any efforts, concerted or otherwise, to drive anyone out of the Far East interport trade, as alleged in subparagraph D. Defendant admits that plaintiff PSI became a party to the AGAFBO agreement, as alleged in subpara-

graph A and became a member of the WCAFBO agreement, as alleged in subparagraph C. Defendant neither admits nor denies the remaining allegations contained in subparagraphs A through D of paragraph 42 of the complaint and avers that it is without sufficient knowledge or information to form a belief as to the truth of such allegations.

13. Defendant denies the allegations contained in paragraph 43 of the complaint.

14. Answering the allegations contained in paragraph 44 of the complaint, defendant admits that in Docket No. 1104, *Pacific Seafarers, Inc. v. Atlantic & Gulf American-Flag Berth Operators, et al.*, the Federal Maritime Commission dismissed a complaint by plaintiff PSI, which complaint rested upon allegations which were virtually identical with those made in the complaint herein.

15. Defendant denies the allegations contained in paragraph 45 of the complaint.

16. Defendant denies the allegations contained in paragraph 46 of the complaint, except defendant avers it is without knowledge or information sufficient to form a belief as to the truth of the allegations as to the profitability of plaintiffs PSI and Seafarers during the period July, 1962 through May, 1963.

17. Defendant neither admits nor denies the allegations contained in paragraph 47 of the complaint and avers it is without knowledge or information sufficient to form a belief as to the truth of such allegations.

18. Defendant denies the allegations contained in paragraph 48 of the complaint.

19. Except to the extent expressly admitted in this answer, defendant denies each and every allegation of the complaint.

WHEREFORE, defendant Matson Navigation Company having fully answered the complaint to the extent required demands judgment dismissing the complaint as against it, together with the costs and disbursements of this action, and any other and further relief which this Court may find just and proper.

Dated: February 20, 1967

ROBERT S. BURK
Robert S. Burk
TURNER, MAJOR, SHERFY & SAGE
2001 Massachusetts Avenue, N.W.
Washington, D. C. 20036
Attorney for Defendant
Matson Navigation Company

(Filed February 20, 1967)

**Motion of Waterman Steamship Corporation
To Dismiss the Complaint**

Waterman Steamship Corporation, a defendant in the above entitled case, hereby moves this Court (1) to dismiss as to all counts the complaint filed herein against Waterman Steamship Corporation on the grounds that the complaint fails to state a cause of action upon which relief can be granted under the antitrust law in that the Court is without jurisdiction over the subject matter of the complaint since the facts alleged in the complaint fail to show that the foreign commerce of the United States was either directly or materially affected; rather, the trade and commerce involved pertained solely to and affected only commerce between foreign nations, or (2) to dismiss the complaint as plaintiffs, Great Lakes Bengal Lines, Inc., Mid-America Steamship Corporation, and J. J. Georgelis, Inc., for failure to state a claim on the ground that the com-

plaint fails to allege that these plaintiffs have suffered any damage "by reason of" an antitrust violation directed at them; rather, the alleged facts show that any damages they may have sustained were indirect, remote, and merely consequential, and not of a type for which the courts have allowed recovery under the antitrust laws.

Respectfully submitted,

CLEARY, GOTTLIEB, STEEN &
HAMILTON

1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

By JOHN K. MALLORY, JR.
John K. Mallory, Jr.

*Attorneys for Defendant,
Waterman Steamship
Corporation*

Of Counsel:

STERLING F. STOUDEMIRE, JR.
61 St. Joseph Street
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February 20, 1967.

(Filed February 20, 1967)

Motion of Defendant American Union Transport, Inc. (1) for Summary Judgment, and (2) to Dismiss as to Plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corporation, and J. J. Georgelis for Failure to State a Claim Upon Which Relief Can be Granted

Defendant American Union Transport, Inc. (AUT) moves this Court to enter Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in its favor

dismissing the action on the ground that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. AUT also moves this Court to dismiss the complaint of Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp., and J. J. Georgelis, Inc. pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Attached to this motion is a Statement of Material Facts and a Statement of Points and Authorities.

Respectfully submitted,

GEORGE F. GALLAND
ROBERT N. KHARASCH
AMY SCUPI

Galland, Kharasch, Calkins
& Lippman
1824 R Street, N.W.
Washington, D.C. 20009
*Attorneys for Defendant
American Union Transport, Inc.*

February 20, 1967

Statement of Material Facts

Defendant American Union Transport, Inc. (AUT) contends there is no genuine issue as to the following facts:

1. Plaintiffs' complaint is based upon the service of Pacific Seafarers, Inc. and Seafarers in the Far East interport trade between Taiwan, Thailand and South Vietnam.
2. Defendant AUT does not now have, and has never had, a service in the Far East interport trade between Taiwan, Thailand and South Vietnam. AUT was made a

defendant in this action solely because of its membership in AGAFBO.

GEORGE F. GALLAND
ROBERT N. KHARASCH
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Attorneys for Defendant
American Union Transport, Inc.

February 20, 1967

(Filed February 20, 1967)

Motion to Dismiss the Complaint in Its Entirety

Defendants Pacific Far East Line, Inc., States Marine Lines, Inc., American President Lines, Ltd., American Mail Line, Ltd., Isthmian Lines, Inc., States Steamship Company, and West Coast American Flag Berth Operators, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, hereby move to dismiss the complaint in its entirety on the grounds that this Court lacks jurisdiction over the subject matter since only foreign-to-foreign commerce outside the reach of the Sherman Act is involved, and because the complaint fails to state a claim upon which relief can be granted since the prior Federal Maritime Commission reparations proceedings, concerning the same key facts which are again asserted by plaintiffs here, is now a complete bar to any recovery based on plaintiffs' instant complaint. Attached to this Motion is a Memo-

randum of Points and Authorities in support of this Motion.

Respectfully submitted,

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Washington, D. C.

FREDERICK M. ROWE
JAMES M. JOHNSTONE
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*Attorneys for Defendants
Named Herein*

EDWARD D. RANSOM
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LILICK, McHOSSE, WHEAT,
ADAMS & CHARLES
311 California Street
San Francisco, California
Of Counsel

February 20, 1967

EXHIBIT A

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No.

PACIFIC SEAFARERS, INC.

v.

ATLANTIC AND GULF AMERICAN-FLAG BERTH OPERATORS
WEST COAST AMERICAN-FLAG BERTH OPERATORS
AMERICAN-FLAG BERTH OPERATORS
ALCOA STEAMSHIP COMPANY, INC.
AMERICAN EXPORT LINES, INC.
AMERICAN MAIL LINE, LTD.
AMERICAN PRESIDENT LINES, LTD.
AMERICAN UNION TRANSPORT, INC.
BLOOMFIELD STEAMSHIP COMPANY
CENTRAL GULF STEAMSHIP CORPORATION
FARRELL LINES INCORPORATED
GRACE LINES
ISBRANDTSEN COMPANY, INC.
ISTHMIAN LINES, INC.
KULUKUNDIS MARITIME INDUSTRIES, INC.
LYKES BROS. STEAMSHIP CO., INC.
MATSON NAVIGATION COMPANY
MOORE-McCORMACK LINES, INC.
PACIFIC FAR EAST LINE, INC.
PRUDENTIAL STEAMSHIP CORPORATION
PUGET SOUND-ALASKA VAN LINES
STATES MARINE LINES, INC.
STATES STEAMSHIP COMPANY
STEVENSON LINES
STOCKARD STEAMSHIP CORPORATION
UNITED STATES LINES COMPANY
WATERMAN STEAMSHIP CORP.

COMPLAINT**I.**

The complainant is a corporation organized and existing under the laws of the State of New York with its principal place of business at 1 Whitehall Street, New York 4, New York. Complainant is a United States-flag common carrier engaged in the regular transportation of cargo by water.

II.

A. The names and respective addresses of the respondents are set forth in Appendix I and are incorporated herein. Respondent corporations are United States common carriers by water engaged in transportation in the foreign commerce of the United States. Respondent, West Coast American-Flag Berth Operators (hereinafter referred to as "WCAFBO"), is an association of common carriers operating under Agreement No. 8186 filed with the Commission. Respondent, Atlantic and Gulf American-Flag Berth Operators ("AGAFBO") is an association of United States common carriers operating under Agreement No. 8086-2, filed with the Commission. There has also been filed with the Commission Agreement No. 8750 between AGAFBO and WCAFBO authorizing the common-carrier members of both to confer and discuss matters embodied in each Agreement. Complainant and respondent corporations are believed to be the only parties to these Agreements. On information and belief, complainant states that respondent, American Flag Berth Operators, is an association fixing or regulating transportation rates or fares, consisting of respondents, American Mail Line, Ltd. ("American Mail"), American President Lines, Ltd. ("APL"), Isbrandtsen Company, Inc. ("Isbrandtsen"), Isthmian Lines, Inc. ("Isthmian"), Lykes Bros. S.S. Co. ("Lykes"), Pacific Far East Line, Inc. ("PFEL"), States Marine Lines, Inc. ("States Marine"), States Steamship Company ("States Steamship"), United States Lines ("U.S.

Lines''), and Waterman Steamship Corp. ("Waterman"), all United States common carriers by water. In view of the foregoing, the corporate respondents and the associations are subject to the provisions of the Shipping Act, 1916, as amended.

III.

A. Complainant is informed, and believes that commencing on or about September 1, 1962, respondents American Mail, APL, Isbrandtsen, Isthmian, Lykes, PFEL, States Marine, States Steamship, U.S. Lines and Waterman, acting through and in consort with the named associations, have attempted, and are continuing to attempt, to force complainant out of the trade in which it is in competition with said respondents. This trade consists of the carriage between Far East ports, including ports in Taiwan, South Vietnam, and Thailand, of cargoes shipped by the Military Sea Transportation Service ("MSTS"), the Department of Defense ("military"), the Agency for International Development ("AID"), and other shippers, and cargoes shipped from ports in the United States to ports in the Far East which are transshipped by respondents *en route* to their destination.

B. Of the cargo which is carried by respondents and complainant between Taiwan, South Vietnam and Thailand, except for MSTS and military cargo, the preponderant amount is shipped at the expense of the United States through AID. Section 901, Merchant Marine Act, 1936, as amended, requires that at least 50 per centum of the gross tonnage of such cargo which may be transported on ocean vessels shall be transported on privately-owned United States-flag commercial vessels to the extent that such vessels are available at fair and reasonable rates for United States commercial vessels. It is believed that under existing practice 100 per centum of such cargo shipped at the expense of the United States to South Vietnam is shipped

on United States-flag vessels. The terms and conditions of such shipments are permitted to be established by the Government of South Vietnam. By providing service at fair and reasonable rates from July, 1962, to the present, complainant has carried a substantial portion of such AID cargoes.

C. In July of 1962, Pacific Seafarers, Inc., commenced a locally-advertised American-flag liner service sailing between Taiwan, South Vietnam and Thailand. In December of 1962, a liner service of two sailings per month was fully advertised and commenced. On February 19, 1963, complainant was awarded a contract for the carriage of MSTS cargo on the basis of its position as a United States-flag liner service operating regularly between ports in Taiwan and South Vietnam.

D. Complainant has been informed, and believes, that in order to force complainant out of the Far East trade, and to monopolize the carriage of such United States cargoes, respondents have by unlawful and unfair means attempted to prevent Pacific Seafarers, Inc., from being awarded the MSTS contract, and from obtaining AID cargoes. On February 15, 1963, in a telegram to MSTS, respondents American Mail, APL, Isthmian, PFEL, States Marine, States Steamship and Waterman stated that Pacific Seafarers, Inc., was a tramp, not liner operator. On information and belief, complainant alleges that this representation was known to be false and was made only for the purpose of preventing complainant from being awarded an MSTS contract.

E. Complainant has been informed, and believes, that in order to deprive complainant of AID cargoes being shipped to South Vietnam, on or about September 1, 1962, respondents competing with Pacific Seafarers, Inc., initiated a scheme designed to have representatives of the Government of South Vietnam establish orders and regulations which have as their sole purpose and effect the elimination

of Pacific Seafarers, Inc. from the carriage of such cargoes. Complainant has been informed, and believes, that by representations which were known to be false and made only to eliminate complainant, said respondents induced representatives of the South Vietnam Government to declare that AID cargoes to that country must be carried on United States "conference" liners. There was, and is no United States conference in the trade. AID has declared that it does not distinguish between conference and non-conference or other United States-flag vessels. Nevertheless, complainant has been informed, and believes, that on or about October 2, 1962, and on other occasions, at said respondents' instance, the Director General of Commerce of South Vietnam directed that AID cargoes to that country be on such "conference" liners. As a result, shippers dealing with the Government of South Vietnam indicated that they could not use complainant's vessels. Complainant's agent in South Vietnam was advised that membership in WCAFBO would constitute being a member of the required "conference." On November 9, 1962, complainant addressed an inquiry to the Secretary of AGAFBO indicating its desire to become a member of WCAFBO and consenting to become a party to Agreement No. 8186. Complainant was advised that because its principal place of business was New York, New York, it would be more appropriate if it became a member of the East Coast counterpart, AGAFBO. Pacific Seafarers, Inc. then joined AGAFBO, effective November 15, 1962. As a result of this action, complainant continued to carry such AID cargo to South Vietnam as was required to be carried on "conference" liners.

F. On or about January 31, 1963, complainant was advised that membership in AGAFBO would not constitute "conference" status for purposes of carrying AID cargoes to be announced for carriage to South Vietnam. Complainant has been informed, and believes, that this order of the Director General of Commerce was induced unlawfully by the respondents in competition with complainant. Again,

shippers indicated to complainant that they could not utilize its vessels. After further discussion with representatives of the Government of South Vietnam, complainant's agents in Saigon, South Vietnam, were advised that membership in WCAFBO would entitle Pacific Seafarers, Inc. to continue to carry AID cargoes. On February 26, 1963, complainant applied for such membership in accordance with the terms of Agreement S186, which was granted effective March 4, 1963. As a result, complainant has continued to carry AID cargoes to South Vietnam.

G. Complainant has been informed, and believes, that such respondents as are in competition with Pacific Seafarers, Inc., are continuing their efforts to exclude complainant from carrying AID cargoes. Said respondents and the Secretary of WCAFBO have advised the aforesaid Director General of Commerce that there is an association, respondent, AFBO, which is a "conference." Complainant has been informed that representations are being made to the effect that cargoes should be limited to members of said "conference."

H. At the time it joined AGAFBO, Pacific Seafarers, Inc. was advised by the Secretary thereof that such membership would entitle it to participation in all "American-Flag Berth Operators" matters. Complainant had, and has, no knowledge of the existence or contents of any agreements or memoranda which set forth the nature and purpose of any separate AFBO "conference" other than WCAFBO and AGAFBO. There is a "Memorandum No. 2 of Agreed Rates to be Charged on Far East Interport Cargo Carried on American-Flag Vessels Owned by Participating Carriers" (hereinafter referred to as the "Rate Agreement") promulgated effective July 1, 1962. Complainant has been informed that said Rate Agreement has not been filed with or approved by the Commission. The "participating carriers" set forth in the Rate Agreement are respondents American Mail, APL, Isbrandtsen, Isth-

mian, Lykes, PFEL, States Marine, States Steamship, U.S. Lines and Waterman. Nevertheless, since joining AGAFBO, Pacific Seafarers, Inc. has been requested by both WCAFBO and AGAFBO to furnish its views concerning particular rates in the Rate Agreement. On February 20, 1963, complainant advised the Secretary of WCAFBO, who, insofar as complainant knows, acts in all matters as the Secretary of the so-called AFBO "conferences," that it wished to take any steps which might be necessary to have said Secretary advise the Director General of Commerce of South Vietnam that Pacific Seafarers, Inc. was a member of any "conference" and a participating carrier to the Rate Agreement. Said Secretary advised that AFBO was a separate entity and that a meeting of the participating carriers was required. Complainant has been advised that on March 19, 1963 such a meeting was conducted in San Francisco, California, at which complainant's "membership" was discussed. Pacific Seafarers, Inc. has not been admitted to the "conference."

I. On March 22, 1963, the following telegram was sent by WCAFBO to certain member lines:

"ESTABLISH OPEN RATES FERTILIZER AND CEMENT TAIWAN SAIGON/TOURANE AND CEMENT BANGKOK SAIGON/TOURANE EFFECTIVE IMMEDIATELY ON NEW BUSINESS ONLY AND NOT APPLICABLE ON PREVIOUSLY BOOKED CARGOES STOP TARIFF CORRECTIONS FOLLOW"

Although a member of WCAFBO, complainant was not consulted and did not receive the quoted communication from the Secretary of WCAFBO. Complainant has been informed, and believes, that the tariff referred to is the Rate Agreement, and that the opening of rates on two of the principal AID commodities carried by Pacific Seafarers, Inc. was solely for the purpose of forcing it out of the

trade. Subsequent to the action of March 22, respondents in competition with complainant lowered rates for cement and fertilizer drastically to a level which is noncompensatory. Such action was solely to prejudice complainant and prevent competition.

IV.

A. Agreements Nos. 8186 and 8086-2, as approved, permit their common-carrier members to:

"... meet from time to time and discuss cargo transportation costs, space availability, sailing schedules, and related matters, and agree as to rates, terms, and conditions of carriage of such cargo, and as to matters relating thereto, which are to be used as a basis for discussions with Military Sea Transportation Service and said related Shipper Service [military] for the purpose of negotiating rates, terms and conditions for the carriage of such cargo . . ."

Agreement 8750 between AGAFBO and WCAFBO also is concerned with only the transportation of MSTS and related "Shipper Services" (military) cargoes by the members of what are described therein as each "group [Atlantic/Gulf and West Coast] of the American-Flag Berth Operators."

B. Agreement No. 8086-2 provides further, "certified and subscribed copies of all minutes of meetings and true and complete records of all affirmative and negative actions of the parties pursuant to or giving effect to this agreement, shall be furnished promptly to the Federal Maritime Commission . . ."

C. The Rate Agreement has been promulgated by WCAFBO and AGAFBO. The Rate Agreement and any modifications or changes thereto are circulated to all interested member lines of AGAFBO and WCAFBO, including Pacific Seafarers, Inc. since it became a member. All

such modifications and changes, and proposed modifications and changes, are discussed by means of regular WCAFBO and AGAFBO circular letters. As a member of AGAFBO, complainant has been requested to furnish its opinion as to proposed rates. Insofar as is known to complainant, the AFBO Rate Agreement has no treasury, paid employees, letterhead stationery or means of distributing or promulgating said Rate Agreement except as is done by WCAFBO and AGAFBO. In practice, the Rate Agreement has as its primary purpose to establish rates for cargo shipped by, or at the expense of, the United States, but not by MSTS and military shippers. Complainant believes that the Rate Agreement does not establish rates for any significant quantity of cargo not purchased and shipped at the expense of the United States or United States shippers. AID cargoes and cargo carried from United States ports and being transshipped for destinations in the Far East constitute nearly the entire trade embraced by the Rate Agreement. The transshipped cargo which is carried by respondents is carried as part of the through service provided by individual respondents from the United States.

D. Agreements 8186, 8086-2 and 8750 encompass the Far East ports covered by the Rate Agreement. As filed each agreement covers:

"... transportation and related services to and from [United States Atlantic-Great Lakes and the Gulf of Mexico ports/United States Pacific Coast ports] and to and from ports and territories and possessions of the United States, also between foreign ports . . ."

These agreements are not meant to apply, however, to other than MSTS and military cargoes. Nevertheless, they and the Rate Agreement have been, and are being, applied to other cargoes not covered by the agreements which have been approved by the Commission.

V.

Attached as Exhibit A is a copy of the Rate Agreement. Attached as Exhibit B is a copy of AGAFBO circular 65-63 of March 11, 1963, indicating the method whereby changes are made in said Agreement. Complainant believes:

1. That the Rate Agreement has been promulgated pursuant to Agreements 8086-2, 8186 and 8750 and that the failure to furnish to the Commission said Rate Agreement and other communications related thereto is in violation of the terms of Agreement No. 8086-2, and 8186, as approved;
2. That Agreements 8086-2, 8186 and 8750 as filed and limited to MSTS and military shipments, are not true and complete copies of the understandings of the members of AGAFBO and WCAFBO who are utilizing said Agreements in connection with AID and other cargoes, in violation of Section 15, Shipping Act, 1916;
3. That the Rate Agreement and such other agreements or memoranda that may evidence an AFBO association, constitute a modification of Agreements 8086-2, 8186 and 8750 or are an agreement between carriers subject to the Shipping Act, 1916, the failure to file and the carrying-out of which are in violation of Section 15;
4. That on the basis of the facts set forth in the foregoing paragraphs, the said Rate Agreement and AFBO are unjustly discriminatory and unfair as between carriers, and the use thereof by respondents is unreasonably prejudicial to complainant, operates to the detriment of the commerce of the United States, and is contrary to the public interest, in violation of the terms of said Section 15 and Section 16 First; and
5. That respondents have failed to file with the Commission tariffs of rates and charges established be-

tween points on their routes and on through routes, and that such rates and charges are unreasonably low in the case of commodities covered by the WCAFBO telegram of March 22, 1963, and unreasonably high in other instances, to the detriment of the commerce of the United States, in violation of Section 18(b).

VI.

As a result of the violations of the Shipping Act as set forth in the foregoing paragraphs, complainant has been injured in that:

1. In December of 1962 it was considered ineligible and did not carry certain AID cargo, which cargo would have been carried by Pacific Seafarers, Inc. to its profit if the Rate Agreement and AFBO and the unlawful nature thereof had not operated so as to make complainant ineligible for such cargo.
2. Although complainant has been carrying substantial quantities of AID-sponsored cement from Taiwan to South Vietnam, it has been informed that all contracts for the transportation of such cargo during the second quarter of 1963 have been awarded for vessels of respondents.
3. If complainant is not a member of AFBO and/or respondents continue to charge unreasonably low, non-compensatory rates solely for the purpose of forcing Pacific Seafarers, Inc. out of the trade, it may be excluded in the future from carrying other AID cargoes which it has been, and is, transporting in substantial quantities and which cargoes may otherwise reasonably be anticipated.
4. If complainant is excluded from carrying AID or other cargoes required to be transported on "conference" vessels, this will so materially diminish the cargoes available to Pacific Seafarers, Inc., that it will be unable to continue its American-flag liner service between Taiwan,

South Vietnam and Thailand and to perform under its MSTS contract, to its substantial damage.

5. Complainant by paying fees and costs as a member of AGAFBO and WCAFBO has been assisting, unwillingly, in the promulgation and maintenance of the unlawful Rate Agreement which, as demonstrated herein, is utilized as an integral part of a scheme to exclude complainant from the carriage of MSTS, military, AID, transshipment and other cargoes in the Far East.

WHEREFORE, complainant prays:

1. that respondents be required to answer the charges herein;
2. that an investigation and hearing be conducted into the matters in this complaint;¹
3. that after hearing, the Commission disapprove and declare unlawful the Rate Agreement, and any other agreements or memoranda which purport to evidence the existence of an association other than WCAFBO or AGAFBO calling itself the "American Flag Berth Operators" or such similar title, or which may modify Agreements S086-2, S186, and S750 and that any actions taken pursuant to the Rate Agreement and said other agreements be declared unlawful, unless and until said Rate Agreement and any other agreements and memoranda are filed and approved and incorporate terms and conditions which prevent unjust discrimination against complainant and other carriers;
4. that respondents be directed to cease and desist carrying out the Rate Agreement and such other agreements and memoranda until such time as they may be approved, and to cease and desist such other violations of the Act found to exist;

¹ Contemporaneously with this complaint, Pacific Seafarers, Inc., is filing a petition setting forth reasons why the Commission should investigate, upon its own motion, the actions of respondents detailed herein, and such other violations of the Shipping Act, 1916, as may be found.

5. that the Commission withdraw approval of Agreements 8086-2, 8186 and 8750 unless and until the parties thereto advise the Commission fully of concerted activities taken thereunder;
6. that respondents, and each of them be directed pursuant to Section 22 to pay to complainant such sum as the Commission may determine to be proper as an award of reparations for all losses suffered as a result of the unlawful nature of the Rate Agreement and/or AFBO, the use of such agreements to complainant's prejudice and detriment, and such other violations of the Act as may be found to have damaged complainant;
7. that respondents be required to file tariffs showing all rates and charges established by and under the Rate Agreement and that the Commission disapprove such rates as found to be unreasonably high or low; and
8. that such other and further orders as the Commission may deem appropriate or just be issued.

Dated at New York, this 19 day of April, 1963.

PACIFIC SEAFARERS, INC.

By /s/ JAMES J. GEORGELIS

James J. Georgelis

President

1 Whitehall Street

New York 4, New York

COLES & GOERTNER

Armin U. Kuder

Stanley O. Sher

1000 Connecticut Avenue, N.W.

Washington 6, D.C.

Attorneys for complainant

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

James J. Georgelis, being duly sworn on oath deposes and says that he is President of Pacific Seafarers, Inc., that he is the person who signed the foregoing complaint; that he has read the complaint, that the facts set forth in the complaint are believed to be true or are based on information received from others which affiant believes to be true.

/s/ JAMES J. GEORGELIS
James J. Georgelis

Subscribed and sworn to before me, a Notary Public in and for the State of New York, County of New York, this 19th day of April, 1963.

.....
Notary Public

My Commission expires

APPENDIX I

Name	Address
Atlantic and Gulf American-Flag Berth Operators	80 Broad Street, New York 4, New York
West Coast American-Flag Berth Operators	7 Front Street, San Francisco, California
American-Flag Berth Operators	7 Front Street, San Francisco, California
Alcoa Steamship Company, Inc.	17 Battery Place, New York, New York
American Export Lines, Inc.	39 Broadway, New York 6, New York
American Mail Line, Ltd.	1010 Ward Building, Seattle 1, Washington
American President Lines, Ltd.	601 California Street, San Francisco, California
Isthmian Lines, Inc.	90 Broad Street, New York 4, New York
American Union Transport, Inc.	17 Battery Place, New York 4, New York
Bloomfield Steamship Company	Cotton Exchange Building, Houston 2, Texas
Central Gulf Steamship Corporation	19 Rector Street, New York, New York
Farrell Lines Incorporated	1 Whitehall Street, New York, New York
Grace Line	3 Hanover Square, New York, New York

Name	Address
Isbrandtsen Company, Inc.	26 Broadway, New York 4, New York
Kulukundis Maritime Industries, Inc.	80 Broad Street, New York 4, New York
Lykes Bros. Steamship Co., Inc.	821 Gravier Street, New Orleans 12, Louisiana
Matson Navigation Company	215 Market Street, San Francisco, California
Moore-McCormack Lines, Inc.	5 Broadway, New York, New York
Pacific Far East Line, Inc.	141 Battery Street, San Francisco, California
Prudential Steamship Corporation	17 State Street, New York, New York
Puget Sound-Alaska Van Lines Div. of Puget Sound Tug & Barge Co.	3414 Iowa Avenue, Seattle 6, Washington
States Marine Lines, Inc.	90 Broad Street, New York 4, New York
States Steamship Company	2 Broadway, New York 14, New York
Stevenson Lines	80 Broad Street, New York, New York
Stockard Steamship Corporation	17 Battery Place, New York 4, New York
United States Lines Company	1 Broadway, New York, New York
Waterman Steamship Corp.	61 St. Joseph Street, Mobile, Alabama

EXHIBIT B

FEDERAL MARITIME COMMISSION

No. 1104

PACIFIC SEAFARERS, INC.

v.

ATLANTIC & GULF AMERICAN-FLAG BERTH OPERATORS, ET AL.

Complainant which had captured major share of wholly foreign interport trade in cement financed by Agency for International Development found not entitled to reparation under section 15, 16 First or 18(b) of the Shipping Act, 1916, as amended, where damages resulted only from drastic reduction in rates by competitive bidding following opening of cement rate fixed by unfiled rate agreement among respondents.

Agreements concerning rates and other matters described in section 15 of the Shipping Act, 1916, as amended, not within jurisdiction of the Commission where they relate solely to foreign interport trade in goods of foreign origin and destination, even though Agency for International Development financed the procurement and shipment of the goods and only American-flag carriers were involved.

Tariffs of rates for transportation between foreign ports not required to be filed by section 18(b)(1) of the Shipping Act, 1916, as amended.

Unfiled agreements outside territorial jurisdiction under Shipping Act, 1916, are not brought within jurisdiction by use of same organizations set up to administer other agreements filed with and approved by the Commission, where the approved agreements dealt with dif-

ferent subject matter and were not modified by the unfiled agreements.

Marvin J. Coles, Stanley O. Sher and Armin U. Kuder for complainant, Pacific Seafarers, Inc.

Elmer C. Maddy and Ronald A. Capone for respondents Atlantic & Gulf American-Flag Berth Operators and its member lines except American Export Lines, Inc., Isbrandtsen Company, Inc., Lykes Bros. Steamship Co., Inc., and Waterman Steamship Corporation.

Edward D. Ransom and Gordon L. Poole for respondents American-Flag Berth Operators and West Coast American-Flag Berth Operators and their member lines except Isbrandtsen Company, Inc., Lykes Bros. Steamship Company, Inc. (not a member of WCAFBO) and Waterman Steamship Corporation.

Edward S. Bagley for respondent Lykes Bros. Steamship Co., Inc.

Sterling Stoudenmire for respondent Waterman Steamship Corporation.

Richard W. Kurrus and James Jacobi (Donald Caldera of counsel) for respondents American Export Lines, Inc., and Isbrandtsen Company, Inc.

Herbert B. Mutter and Robert J. Blackwell, Hearing Counsel.

Initial Decision of Walter T. Southworth, Examiner¹

This is a proceeding upon the complaint of an American-flag carrier alleging that other American-flag carriers, by concerted action in violation of the Shipping Act, 1916, are trying to drive it out of its business of carrying United

¹ This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. See Rules 13(d) and 13(h), Rules of Practice and Procedure (46 CFR 502.224, 502.228).

States Government-financed "AID" cargo from Taiwan and Thailand to South Viet Nam.

Pacific Seafarers, Inc., filed its complaint on April 19, 1963, alleging upon information and belief that commencing on or about September 1, 1962, respondents American Mail Line, Ltd. ("AML"), American President Lines, Ltd. ("APL"), Isbrandtsen Company, Inc. ("Isbrandtsen"), Isthmian Lines, Inc. ("Isthmian"), Lykes Bros. Steamship Company, Inc. ("Lykes"), Pacific Far East Line, Inc. ("PFEL"), States Marine Lines, Inc. ("SML"), States Steamship Co. ("States Steamship"), United States Lines Co. ("USL") and Waterman Steamship Company ("Waterman"), acting "through and in consort" with the respondent associations Atlantic and Gulf American-Flag Berth Operators ("AGAFBO"), West Coast American-Flag Berth Operators ("WCAFBO"), and American-Flag Berth Operators ("AFBO"), have attempted and are continuing to attempt to force the complainant out of the trade in which it is in competition, in American-flag liner service, with the foregoing carrier respondents (sometimes referred to hereinafter as the "AFBO respondents"). The trade is described as the carriage between Far East ports, including ports in Taiwan (Formosa), South Viet Nam and Thailand, "of cargoes shipped by the Military Sea Transportation Service ("MSTS"), the Department of Defense (military), the Agency for International Development ("AID"), and other shippers and cargoes shipped from ports in the United States to ports in the Far East which are trans-shipped by respondents *en route* to their destination;" however, as limited by the proof, the only trade involved is that in AID-financed shipments of local origin, principally cement, from Taiwan (and to a limited extent from Thailand) to South Viet Nam. In addition to the ten AFBO respondents named above, fourteen American-flag operators hereinafter identified are also made respondents, but only because of their "membership" in either AGAFBO or WCAFBO.

The alleged overt acts of the AFBO respondents may be classified as (1) attempts to get the Director General of Commerce of South Viet Nam to require that AID cargoes be carried in United States conference vessels and thus to disqualify complainant, although complainant joined AGAFBO and WCAFBO, and tried to join AFBO, in an effort to become a member of whatever the Director General considered a conference; (2) an attempt to prevent complainant from getting a contract with MSTS; and (3) rate activity, particularly the opening of the rates for cement and fertilizer specified in a "Rate Agreement" promulgated by the AFBO respondents, and the subsequent reduction of such rates to a "noncompensatory" level.

As to violation of the Shipping Act, 1916 (the Act), complainant alleges that the only agreements filed by respondents with the Federal Maritime Commission (the "Commission") are the AGAFBO and WCAFBO agreements limited to MSTS and military shipments, which are not true and complete copies of the understandings of respondents; and that the Rate Agreement, covering agreed rates on interport AID cargo, is in "violation" of such filed agreements and, together with other agreements of the parties, constitutes an unfiled modification thereof; all in violation of section 15 of the Act. The Rate Agreement, and AFBO, are alleged to be unjustly discriminatory and unfair as between carriers, unreasonably prejudicial to complainant, detrimental to the commerce of the United States, and contrary to the public interest, in violation of section 15 and section 16 First of the Act. It is further alleged that respondents have failed to file their established rates, and that such rates are unreasonably low in the case of cement and fertilizer and unreasonably high "in other instances", to the detriment of the commerce of the United States, in violation of section 18(b) of the Act.

As a result of these violations of the Act, it is alleged, complainant did not, in December 1962, carry certain AID

cargo which it would otherwise have carried; all contracts for carriage of AID cement from Taiwan to South Viet Nam during the second quarter of 1963 were awarded to respondents; complainant may be excluded from future AID cargoes, so that it will be unable to continue its liner service; and by paying fees and costs as a member of AGAFBO and WCAFBO, complainant has "unwillingly assisted" the unlawful Rate Agreement which is part of a scheme to exclude complainant from the trade.

Complainant asks the payment of such reparations as are determined to be proper; that various agreements of respondents be declared unlawful until all their agreements and modifications thereof are filed and approved; that respondents be directed to cease and desist from the alleged violations of the Act and to file all rates and charges established under the Rate Agreement; and that the Commission disapprove such rates as are found unreasonably high or low.

The answers of respondents deny the material allegations of the complaint or, with respect to material allegations that are admitted, such as the existence of the unfiled Rate Agreement, deny that respondents are subject to the provisions of the Act with respect to those matters. The AFBO and WCAFBO respondents deny the allegations relating to transshipped cargo in the trade from the United States, and deny that the Rate Agreement is concerned with other than foreign to foreign cargo; and they allege that complainant was offered membership in AFBO but refused to join.

Before answer, respondents moved to dismiss the complaint on the ground that it relates solely to Far East interport trades, "foreign to foreign" commerce to which the jurisdiction of the Commission does not extend. Certain of the respondents also moved to dismiss on the grounds that they do not serve the trades in question and are not alleged to have participated in any of the acts

charged, being joined as respondents only because they are parties to the AGAFBO or WCAFBO agreements. In accordance with the Rules of Practice and Procedure, these motions were referred to the Commission, which denied them with the finding, based of course upon the allegations of the complaint, that the jurisdictional issue involved questions of law and fact which should be determined only on a complete record.

Hearing Counsel were granted leave to intervene on the ground that the proceeding related to issues impressed with a public interest. Following the hearing, Hearing Counsel submitted their brief supporting the position of respondents that the complaint should be dismissed for lack of jurisdiction, contending that the Act does not apply to the movement of foreign interport cargo, with which the complaint is exclusively concerned, and that the exercise of Commission jurisdiction herein would be contrary to law.

FINDINGS OF FACT

1. Complainant, Pacific Seafarers, Inc. (sometimes referred to hereinafter as "PSI"), is one of several corporations used by J. J. Georgelis, of New York City, in connection with various shipping ventures. Georgelis and his wife are the sole stockholders of all these corporations, except that 24.5% of the stock of one of them (Seafarers, Inc.—not the complainant herein) is held by members of their families. Pacific Seafarers, Inc. is a New York corporation with its office at One Whitehall Street, New York City; it was incorporated July 12, 1961, as Mermaid Shipping Co., Inc. by Georgelis's then agent. It was dormant in July, 1962. At that time it was acquired by Georgelis and its name changed to Pacific Seafarers, Inc., for use (together with the aforesaid Seafarers, Inc.) in a new venture which Georgelis had embarked upon under the circumstances hereinafter described.

2. In the latter part of May, 1962, on the way home from a business trip to Pakistan, Georgelis stopped off at Bangkok, Thailand. He had heard that there were tenders for cement movements from Thailand to South Viet Nam, as well as from Taiwan to South Viet Nam. At Bangkok he learned that Siam Cement Company was the shipper of Thailand cement, and that it was keenly interested in U. S. flag ships. All the shipments were and are financed (but not procured or shipped) by AID, which implements the requirements of the Cargo Preference Law* with a regulation requiring that at least 50 percent of the gross tonnage of all AID-financed commodities transported to a recipient country, during each fiscal year, as well as each quarterly period thereof, be transported on privately-owned U. S.-flag commercial vessels, to the extent that they are available at fair and reasonable rates for such vessels. Siam Cement Company's interest developed into a tramp contract with Seafarers, Inc., to carry a quantity of AID cement from Bangkok to Saigon, South Viet Nam. At Siam Cement's suggestion, Georgelis also went to Saigon to meet a man named Ohl, of a local shipping agency referred to as RAUZY (its cable address), with whom he talked about the AID cement shipped from Taiwan. He was told that Ohl and United Exporters, an agent in Taiwan, might secure sufficient cargo to make it worthwhile for a "regular American flag service" operating between Taiwan and South Viet Nam. Georgelis was agreeably surprised by the potential volume of cargo, "so I put a ship on the berth" between ports on Taiwan and the ports of Tourane and Saigon in South Viet Nam. The ship was the *Anji*, an American flag Liberty ship owned by Seafarers, Inc., which it time-chartered to Pacific Seafarers, Inc. Contemporaneously, advertising of the PSI service, in Chinese, was placed in papers in Taipei, Taiwan, starting about two weeks before the initial PSI voyage, which was made in July, 1962.

* Section 901(b) of the Merchant Marine Act, 1936, as amended.

3. At or about the time that Georgelis acquired and activated the complainant corporation and put it into the Taiwan-Viet Nam trade advertised as a berth operator, he also began to carry cement in the same trade, as well as in the Thailand-Viet Nam trade, as an American-flag tramp operator through Seafarers, Inc. For this purpose Seafarers, Inc., used the chartered Liberty ship *San Marino* and the chartered *Era Cynthia*; also, from September 10 to November 25, 1962, it used its own vessel, the *Anji*, which it reacquired from Pacific Seafarers, Inc. for this period.

4. The *Anji* having been turned over to Seafarers, Inc. for the latter's tramp cement-carrying operation, complainant Pacific Seafarers, Inc., had no ship on berth between September 10, 1962 and November 25, 1962; and its first voyage after September 10, 1962, began loading December 4, 1962, in the Taiwan-Viet Nam trade. Complainant did not have any vessel in the Thailand-Viet Nam trade at any time prior to March, 1963.

5. When he entered the trade, Georgelis knew that there was American-flag competition, but felt that the competition was primarily engaged in round-the-world or round-trip services from the United States, and that the existing American flag lines, with their high-cost, more expensive vessels, would not be interested in cargoes between Taiwan and South Viet Nam. However, he made no inquiry as to this. Had he done so, he might have found that while he had sensed the situation very accurately as to most of the AFBO respondents, respondents PFEL and SML were in fact seriously interested in the interport traffic in AID cement and not anxious to relinquish the substantial revenue that it generated.

6. PSI's primary cargo was cement, solicited in Taiwan. There is no evidence that complainant has ever solicited or carried any cargo of any kind originating in or transshipped from the United States; it is engaged only in foreign-to-foreign interport trade in cargo of local origin.

Substantially all cargo carried by PSI has been AID-financed cargo: no other cargo was sought, although occasionally a small amount was offered and carried at prevailing local rates. PSI applied for and obtained an MSTS contract, but has never carried any MSTS cargo or, as far as the record shows, any other United States Government-owned cargo; and there is very little MSTS cargo in the trade. Georgelis conceded that PSI participates in the trade for the sole purpose of getting cargo which is financed by the United States through AID, because of the higher freight rates that these cargoes can bear. It has used only American flag ships, with American crews.

7. Pacific Seafarers, Inc. was profitable from its inception through May, 1963. Except for one heavy-weather voyage, each voyage was profitable. The third quarter 1962 cement from Taiwan (i.e., cement to be carried from about August 1 through October 31—about a month later than the calendar quarter) was all fixed to move on the *Anji* and *San Marino*. On September 9, 1962, the *Eva Cynthia*, *San Marino* and *Anji* (then on her third voyage) were all discharging cement at Saigon—the first two vessels as tramps under the aegis of Seafarers, Inc., and the *Anji* on a "liner voyage" for Pacific Seafarers, Inc. Between them they brought 17,189 tons of cement to Saigon, besides an undisclosed amount for Tourane. The *Anji* sailed September 10, 1962, on a tramp cement voyage for Seafarers, Inc., bringing to a close the service of complainant until December 4, 1962. SML, which had carried "a lot of cement" into Saigon in 1960, 1961 and until July, 1962, was practically excluded from the business until after rates were opened in late March, 1963. PFEL, which considered the interport cement cargoes to Viet Nam a very important part of its trans-Pacific operation, got no cement business whatever in the second half of 1962, a "couple of parcels" in January, 1963, and another parcel in March, 1963; although it actively sought tonnage during the period, it also was virtually excluded.

8. With all the third quarter 1962 cement (after September 10 at least) being carried on tramps, PFEL's Saigon agent was endeavoring, through the Viet Nam cement importers, and possibly through direct contacts with the Director General of Commerce of South Viet Nam, to get the Director General to specify that liners be used (as had previously been required) instead of tramps to carry the fourth quarter cement, notwithstanding the lower rates available from tramps. Parenthetically, complainant claims to have been at all times a liner operation, conforming with the AFBO respondents' Rate Agreement, but Seafarers, Inc., used lower rates. On September 15, 1962, PFEL's Saigon agent reported that he was following the matter closely with the cement importers, who favored liners; but that because of the tramps' lower rate the Director General's decision to "impose" liners was still pending. On September 22, 1962, the agent reported on a meeting with the United States Operating Mission ("U.S.O.M"—which supervises AID programs) and the Director General. According to the agent's cable, U.S.O.M. and the Director General were against tramps, mainly because of the inconvenience of having several fully-loaded vessels discharging at Saigon at the same time; and were agreeable to using liners despite their higher rate provided they split their calls "suitable Viet Nam economy best". The cable further stated: "Expected conference members together make arrangement for weekly call Saigon." Thereafter a meeting of the AFBO lines was held and it was determined that there would be no difficulty in meeting a weekly service requirement of the Director General.

9. Under date of October 2, 1962, the Director General of Commerce of South Viet Nam ("Dircom") wrote Siam Cement Company concerning the supply of Thailand AID cement for the fourth quarter, 1962. He accepted Siam Cement Company's offer to supply 20,000 metric tons for delivery in November and December (1962) and Jan-

uary (1963), subject to conditions stated. These included, under "Freight rate": "Must be transported on U. S. liners of conference at U. S. \$8.42 per m/ton" (Exh. 1-d). A similar condition as to conference liners was contained in letters to Taiwan suppliers of fourth quarter cement. (The "acceptance" by the Director General is in effect an approval of the purchase, by private importers in Viet Nam, of cement from the suppliers in the quantity and upon the terms approved, the cost of the commodity as well as shipping costs to be financed with available AID funds).

10. Under date of October 17, 1962, Georgelis's Saigon agent, Ohl, wrote complainant as follows, with a copy to "U.S.O.M., Washington c/o Pacific Seafarers, N.Y." (Exh. 1a, 1b), enclosing a copy of the Director General's letter of October 2, 1963 to Siam Cement Co.:

We thank you for your cable of October 15th and are pleased to forward you herewith a photostat of the letter in Vietnamese dated October 2nd with free translation from the Directorate General of Trade requiring that importations of cement during the last quarter of this year be carried by American Conference Liners.

We wish to bring to your attention the fact that to our knowledge, there is no *American Liner Conference* serving Bangkok/Taiwan and Saigon or any other port in this region of the Far East.

There exists a *rate agreement* signed by several American Lines for the carriage of freight by American flag vessels on Far East Interport cargo. The ports involved are those of Taiwan, Japan, Thailand, Korea, Vietnam, Philippines, Okinawa and Cambodia. This agreement, similar to the one established by most Shipping Lines for cargo from Saigon, is known as the American Freight (sic) Berth Operators (AFBO). It is not a conference, nor can it be assimilated to one,

since it in no way fulfills the requirements and obligations of a full scale conference, but merely agrees to reduce to uniformity the *rates* charged by the participating carriers.

Consequently, until such a conference comes into official existence, we plainly do not see how American Liner Companies not belonging to the AFBO can be *eliminated* from getting a share of the cement business.

On the other hand, the decision requesting shipment of the cement by *Conference bottoms* can hardly be implemented in view of the foregoing.

The history of the importation of cement in Vietnam during the past years has gone through many rises and falls. We shall not endeavor to recapitulate herein the various phases; this task would prove rather tedious.

As we are primarily concerned with its transportation, we could state that, in order of succession, the following vessels were used: foreign liners, foreign tramps, U.S. liners, U.S. tramps, U.S. liners again, U.S. tramps and now U.S. conference liners. And yet, 95% of the cement importers claim they are running at a loss.

For two years, everyone seemed happy with U.S. tramps (West Coast Shipping Company) then liners were requested to limit the arrivals.

The results were not altogether eloquent. In one instance, we remember that the following liner vessels were simultaneously discharging cement in Saigon between June 23rd and July 7th: "Alcoa Pilgrim" 7.000 T., "Chicot"² 4.800 T. "Cooper State" 6.000 T., "Washington Bear" 4.800 T. "Alcoa Pilgrim" 3.000

²"Chicot" was an American flag vessel operated in the interport trade by Jones & Guerrero, of Guam. Although Ohl indicated in his letter that she was a liner, she was considered a tramp operator by AFBO; she was from time to time a "prime competitor" for the cement business.

T. "Columbia Trader" (tramp) 9,000 tons. In other words, 31,000 tons were unloaded within two weeks.

This can be understood in that the courses and transit times of all vessels are not regular, moreover, two ports are involved which complicates the arrivals.

Nevertheless, trusting on the basis of the above summary, you will be able to successfully expound your case to Washington for whom we have attached, if need be, a copy of this letter, we remain,

11. The AFBO Rate Agreement (which is the rate agreement referred to in Ohl's letter) is a printed memorandum of about 25 pages (including various correction sheets) described on its cover page as "Memorandum No. 2 of Agreed Rates to be charged on Far East Interport Cargo carried on American-Flag Vessels owned by participating carriers as listed on page 2 thereof between ports in Taiwan and/or Japan (as specifically named herein) and specified ports in Thailand, Korea and Vietnam also Philippine Islands, Okinawa and Cambodia (as indicated)." The participating carriers listed are the ten AFBO defendants. The Rate Agreement in its current form was issued July 1, 1962, except for numerous revised pages showing changes effective thereafter. A note on the cover page states:

This Memorandum of Agreed Rates (which cancels Original Memorandum of Agreed Rates issued and effective May 1, 1959) is a codification of all existing RATE ADVICES issued by the American-Flag Berth Operators, 7 Front Street, San Francisco 11, California, and agreed to and concurred in by all the carriers listed on page 2 of this Memorandum.

Each page except the cover is headed "American-Flag Berth Operators." Requests for missing pages may be made by writing to "American-Flag Berth Operators, 7 Front Street, San Francisco 11, California." The Rate

Agreement has never been filed with the Commission, nor has any agreement providing for the establishment or maintenance of interport rates such as those contained in the Rate Agreement. Its origin is further described in finding no. 22.

12. There is no direct evidence in the record as to why the Director General specified conference liners (as opposed to liners generally), or what he meant by "conference". PFEL assumed that he referred to AFBO liners, since PFEL considered that there was no other liner service in the trade. Whatever may have been the liner status of Pacific Seafarers, Inc. prior to September 10, 1962, it was not operating any berth service at the time the Director General's letter was sent to Siam Cement Company, and had never operated in the Thailand-Viet Nam trade; and there was in fact no liner service in the trade at such time except that of certain AFBO respondents.

13. Around the middle of October, 1962, Georgelis asked Washington counsel to check with the Commission as to the existence of a conference for the area. His counsel then discovered agreements filed by AGAFBO and WCAFBO pursuant to section 15 of the Act. These were Commission Agreement No. 8086 (as amended), referred to as the Atlantic and Gulf American Flag Berth Operators ("AGAFBO") agreement; Commission Agreement No. 8186, referred to as the West Coast American-Flag Berth Operators ("WCAFBO") agreement; and Commission Agreement No. 8750, a "joint agreement" between the parties to the AGAFBO and WCAFBO agreements. All three of these agreements relate solely to collective negotiation of rates and terms with MSTS and related shipper services (Army, Navy, Air Force and other United States Military Services), and discussions and agreements between the parties with respect thereto. The AGAFBO agreement, originally approved by the Commission's predecessor July 30, 1956, recites that the signers are all common carriers

by water in the foreign commerce of the United States who have from time to time been providing service "to and from United States Atlantic and Gulf of Mexico ports, and to and from ports in territories and possessions of the the United States, also between foreign ports, hereinafter referred to as the trades covered by this Agreement", for and at the request of MSTS and related shipper services. The WCAFBO agreement, approved November 26, 1956, contains the same recitation, except that "United States Pacific Coast ports" takes the place of "United States Atlantic, Great Lakes and Gulf of Mexico ports". Each agreement provides that "Any United States flag common carrier by water engaged in the trades covered by this Agreement may become a party hereto by signing this Agreement". The "joint agreement" provides for discussions between the two groups, but each group is to vote and operate "within the framework" of its respective section 15 agreement. Members of either Agreement 8086 or Agreement 8186 automatically become members of the joint agreement.

14. The AGAFBO and WACFBO agreements, including the joint agreement, do not relate to any Far East interport rates other than those negotiated with MSTS or related shipper services of the United States Government for the carriage of military cargo owned by the Government; particularly, they do not relate to the AFBO Rate Agreement or any rates set forth therein. There is a Far East interport rate agreement with MSTS, but the rates therein provided are different from those in the AFBO Rate Agreement, and do not apply to "AID cargo", which is cargo procured by private importers pursuant to normal commercial practices, the procurement and shipment of which is financed by AID subject to AID procurement policies. The MSTS Far East Interport rates have been filed with the Commission along with rates negotiated with MSTS for carriage to and from U. S. ports, but the Commission's Division of Foreign Tariffs, in directing certain amend-

ments to the WCAFBO tariff, noted that the "rates between foreign ports may be retained in the tariff for information purposes" (Exh. 58).

15. The parties to the AGAFBO agreement include seven of the AFBO respondents (Isbrandtsen, Isthmian, Lykes, SML, USL, APL and Waterman, and also the following thirteen respondents who (except for American Export Lines, acting through its Isbrandtsen division)³ are not participating carriers in the AFBO Rate Agreement and concededly do not compete with complainant in the service with which the complainant is concerned. Except for American Export Lines, Inc., through its Isbrandtsen division, none of them has had any part in any act complained of or, as far as the record shows, had any knowledge of such activities:

Alcoa Steamship Company, Inc.	Kulukundis Maritime Industries, Inc.
American Export Lines, Inc.	
American Union Transport, Inc.	Matson Navigation Company
Bloomfield Steamship Company	Moore-McCormack Lines, Inc.
Central Gulf Steamship Corporation	Prudential Lines, Inc.
Farrell Lines Incorporated	Stevenson Lines
Grace Lines, Inc.	Stockard Steamship Corporation

16. The parties to the WCAFBO agreement include all the AFBO respondents except Lykes and United States

³ Isbrandtsen Company, Inc., has had no steamship services since June 1, 1962, when those services were acquired by American Export Lines, Inc. and operated as its Isbrandtsen division. References to "Isbrandtsen" after that date, unless otherwise indicated by the context, refer to American Export Lines, Inc., even though the corporate relationship was not consistently indicated in practice (cf. Exh. 16 and Exh. 17) and the old and new corporations were not always prompt in getting the new set-up officially established. The WCAFBO agreement was not properly amended in the Commission's files to show Isbrandtsen as a division of Export until November 5, 1962 (Exh. 15). There is nothing in the record to indicate that Export assumed liability for the past acts of Isbrandtsen Company, Inc. (it was not a corporate merger), but complainant could not possibly have been injured by acts done before June 1, 1962, when Isbrandtsen Company, Inc. ceased to operate as a carrier.

Lines (both of whom are parties to the AGAFBO agreement), and also the following two respondents who are associate members of WCAFBO not permitted to vote on matters relating to any trade except their respective U.S.-Hawaii and U.S.-Alaska trades. They are not participating carriers in the AFBO Rate Agreement and concededly do not compete with complainant in the service with which the complaint is concerned. Neither of them has had any part in any act complained of or, as far as the record shows, had any knowledge of such activities:

Matson Navigation Company
Puget Sound-Alaska Van Lines

17. At or about the time that they discovered the AGAFBO and WCAFBO agreements, Georgelis and his counsel checked with officials in Washington. Georgelis was told that so far as AID was concerned there were only three types of carrier—tramps, liners and tankers, and thus no reason to specify conference liners; and the AID official said he would cable AID officials in Taiwan and Saigon to find out what was going on.

18. After finding out about the AGAFBO and WCAFBO agreements, Georgelis arranged to have a friend of his who lived in San Francisco, Bill Joyce, go to the address of the American Flag Berth Operators shown on the AFBO Rate Agreement (which is the same as WCAFBO's address) to find what that organization was and what constituted membership. Joyce called on Page, the secretary of WCAFBO who also acted as secretary or "clearing house" for AFBO, on November 8, 1962. Joyce handed Page a card of Pacific Seafarers, Inc., which Page had never heard of, and said PSI wanted to join WCAFBO. After learning that PSI's office was in New York, Page suggested to Joyce that Georgelis confer with Hansen, the AGAFBO secretary, since AGAFBO's operation was the same as WCAFBO's. No organization other

than WCAFBO was mentioned by Joyce. Joyce reported to Georgelis that "there was actually no need to join WCAFBO in San Francisco but to contact AGAFBO in New York". Next day Georgelis telephoned Page; Page's contemporaneous memorandum of the call refers to MSTS cargo, and does not mention AID cargo.

19. Georgelis then telephoned Hansen, secretary of AGAFBO, in New York; Hansen was out, so Georgelis left a message with his secretary that he desired to join AGAFBO. Georgelis thought this was equivalent to joining WCAFBO—in fact he signed a copy of the WCAFBO agreement, which he had got from his Washington counsel, and sent it in to AGAFBO. Eventually he talked with Hansen, who told him that AGAFBO dealt strictly with military cargo and dealings with MSTS and that unless he was interested in carrying military cargo there was no point in joining AGAFBO. Georgelis said he was interested in military cargo and in AID cargo, and asked about AFBO. Hansen told him AFBO dealt with non-military interport cargo in the Far East, and that the members of AGAFBO serving in that area were members of AFBO. Georgelis satisfied Hansen that he was a common carrier, and PSI became a party to the AGAFBO agreement effective November 15, 1962.

20. Meanwhile, on November 8, 1962, one of the AFBO respondents in New York was advised by cable from its agent that "tramps" were pressing AID for withdrawal of the Director General's decision specifying conference vessels only, claiming that AFBO was not a conference but "only a freight agreement which should nullify Dir-com's directive". The agent's cable further stated:

IN EFFORT TO RESIST TRAMP INTERVENTION AND STOP CURRENT TRAMP THREAT OF ESTABLISHING THEIR OWN SO CALLED CONF THEREBY QUALIFYING UNDER DIRCOMS PRESENT DIRECTIVE AGENTS OF AFBO LINES IN SAIGON AND IMPORTERS REQUEST ASSISTANCE FROM AFBO CHAIRMAN/SECRETARY IN SANFRAN TO CABLE ADV PRESIDENT OF CEMENT

IMPORTERS ASSOCIATION IN SAIGON AUTHENTICITY OF AFBO AND ANY OTHER ARGUMENTS THAT CAN BE OF ASSISTANCE TO DIRCOM IN QUALIFYING AFBO REPUTABLE STANDING OVER AN ORGANIZATION THAT THE TRAMPS MAY FORMULATE EXCLUSIVELY FOR THIS CURRENT MOVEMENT OF CEMENT TO VIETNAM.

The agent was advised that the carrier would try to get the "secretary WCAFBO SF" to dispatch an appropriate cable; that technically AFBO was only an agreement and not an official conference;

HOWEVER FEEL CAN STRESS THAT ITS MBR'S CONSIST OF ONLY AMERICAN FLAG COMPANIES WHO ARE MBR'S OF VARIOUS FRT CONFERENCES AND ARE ALL TRULY BERTH OPERATORS AND DO NOT BELIEVE TRAMPS CAN FORM AGREEMENT THAT WOULD MAKE THEM TRU LINER OPERATORS.

The carrier asked Page to take the matter up with the "group" and suggested a form of cable for him to send to the president of the cement importers' association in Saigon. On November 8, Page sent the following cable to Saigon:

WE CONFIRM THAT AFBO CONSISTS OF THE AMERICAN FLAG STEAMSHIP COMPANIES AS LISTED IN AFBO MEMORANDUM NO. 2 OF AGREED RATES ALL OF WHICH ARE ACTIVELY PARTICIPATING IN REGULAR BERTH TRADES BETWEEN THE UNITED STATES AND THE FAR EAST AREA AND ARE MEMBERS OF FREIGHT CONFERENCES AND WHO ALSO TRADE WITHIN THE FAR EAST AREA ON A REGULAR BASIS. THIS GROUP WAS ESTABLISHED IN 1950 IN ORDER TO ESTABLISH STABILITY IN RATES AND SERVICE FOR THE CARRIAGE OF INTERPORT CARGO. TRAMP OWNERS WOULD NOT QUALIFY FOR MEMBERSHIP IN THIS GROUP AS THEY DO NOT MEET REQUIREMENTS FOR PROVIDING REGULARLY SCHEDULED SERVICE AND RATES THAT ARE ESSENTIAL IN ORDER TO ALLOW TRADERS TO PARTICIPATE IN FUTURE BUSINESS WITH THE ASSURANCE OF HAVING FIRMLY ESTABLISHED RATES, CONDITIONS AND SERVICE.

21. Georgelis's main reason for joining AGAFBO was that he thought it made him qualify as a conference liner under the Director General's specification. Apparently he had taken the position that AFBO was not such a con-

ference (findings no. 10 and no. 20). Georgelis first heard of AGAFBO through his counsel in Washington; there is nothing in the record to indicate that the Director General's specification of U. S. conference liners referred to, or would be satisfied by membership in, AGAFBO, or that anyone, including the respondents, told Georgelis that joining AGAFBO would satisfy the Director General's requirement. On the other hand, Georgelis expressly conceded that he had read the AGAFBO contract when he signed it, and understood that it, as well as the WCAFBO agreement, applied to MSTS and related cargo, and not to AID cargo. However, Hansen, the secretary of AGAFBO, who also acted until March 28, 1963, as a "conduit" for AFBO information to and from AFBO members on the East Coast, treated PSI as though it were a member of AFBO and participant in its Rate Agreement, as set forth in finding 26.

22. Like the AGAFBO and WCAFBO agreements, the AFBO Rate Agreement and AFBO (to the extent that it may be considered an entity apart from the Rate Agreement) evolved from discussions among American-flag berth operators of matters of peculiar interest to such operators. Under the Cargo Preference Law, they are given preference in the carriage of cargoes arising out of the foreign assistance activities of United States Government agencies. In dealing with foreign shippers of foreign assistance cargoes, first financed by FOA (Foreign Operations Administration), later by ICA (International Cooperative Administration), and still later by AID, the American flag operators in the Far East trades found it desirable to establish uniform rates for such cargoes in Far East interport trades. When such cargoes originated in the United States they were carried at the established rates of the applicable conference; but the American-flag carriers were not members of any conference establishing Far East interport rates, such as the Japan-Saigon Freight Conference, and were not generally accepted by

such conferences. So, under the descriptive title of American-Flag Berth Operators (which inevitably was referred to as AFBO), the AFBO respondents established agreed rates covering commodities available to them in the Far East interport trade, whether or not financed by AID. These rate discussions began in the early 1950's. In 1959 the operators issued a Memorandum of Agreed Rates which "codified" all existing rate advices which they had issued; and the original memorandum was superseded and cancelled by Memorandum No. 2 (the Rate Agreement) issued as of July 1, 1962.

23. There is no formal AFBO organization, no charter or basic agreement, no by-laws, no dues, no treasury, and no paid employee. Until Pacific Seafarers came along, there had been no changes in members or participants, except for changes of corporate name or interest. Originally "spokesmen" were appointed on a rotating basis from the participating carriers, and the line whose employee was spokesman absorbed the nominal expenses involved. Since 1956, when the WCAFBO and AGAFBO agreements were formalized and paid secretaries installed, each with an office and amanuensis, the secretary of WCAFBO (Mr. Page) has acted as spokesman and clearing house for communications concerning AFBO matters. From 1956 until March 28, 1963, the secretary of AGAFBO (since 1959 Mr. Hansen) relayed communications between Page and the AFBO participants headquartered on the East Coast. The costs and expenses of these activities on behalf of AFBO, including employees' time, were absorbed by WCAFBO and AGAFBO. The AFBO Rate Agreement provides that all questions of interpretation are to be "referred to the respective Operators' Secretary for appropriate determination"—apparently referring to the secretaries of WCAFBO and AGAFBO, though not necessarily in their capacities as such.

24. When Page, in San Francisco, had information to be distributed to, or wanted a vote or decision from, one

of the three East Coast AFBO participants (U.S. Lines, Lykes and Isbrandtsen) he usually phoned, telegraphed or wrote Hansen. Hansen then got out a bulletin on the AGAFBO letterhead, or if necessary telephoned. Generally, the AGAFBO bulletins merely copied material from form letters or bulletins distributed by Page to Pacific Coast participants. AGAFBO maintains separate mailing lists for its members active in various areas—e.g., in addition to Far East lines, there are lines operating in the Mediterranean, Bordeaux-Hamburg range, Persian Gulf, etc. Matters other than those of general interest or policy go only to the group concerned, and there is no effort to allocate expenses between groups. AFBO material went only to the AGAFBO Far East lines mailing list. Until Pacific Seafarers, Inc., joined AGAFBO, the carriers on this list were all participants in the AFBO Rate Agreement, hence did not include any of the AGAFBO members other than those who are also AFBO respondents.

25. From time to time, representatives of the American-flag lines operating in the Far East met in Tokyo or Yokohama to have lunch, play golf and discuss matters of mutual interest. Such matters included local MSTS operating problems, which were sometimes discussed with local MSTS officials, as well as rates in the Far East inter-port trades. No rate agreements were made or authorized to be made at the meetings in Japan; any decisions involving rates were made in the United States in connection with AFBO Rate Agreement. However, the Japanese organization—which was an organization only to the extent that a “revolving” or “honorary” chairman was chosen from time to time from among the local representatives of the Far East carriers—also became known as AFBO-Japan-or AFBO-Yokohama; and it sometimes disseminated “AFBO information” through the office of Page in San Francisco.

Another joint activity of American-flag berth operators in the Far East concerns rates and conditions in the carriage of military household goods, and has been formalized by an agreement filed with and approved by the Commission. This agreement, referred to as TPAFBO ("Trans-Pacific American Flag Berth Operators") is also administered through Page at San Francisco; its participants were not identified in the record, and its activities are not complained of in this proceeding.

26. When PSI became a member of the AGAFBO agreement, its name was added to the AGAFBO Far East lines mailing list. Thereafter, PSI received copies of all AFBO material routed through Hansen. In November, immediately after PSI joined AGAFBO, Georgelis was asked to approve the use of a special rate in connection with a movement of cement from Japan to Viet Nam, and the concurrence of Pacific Seafarers was duly reported by AGAFBO bulletin. Also, Georgelis asked Hansen to obtain approval for PSI to carry the balance of a Seafarers, Inc. tramp cement contract at less than the AFBO rate, and Hansen telegraphed the request to Page, who obtained approval from five of the Pacific Coast members, apparently by telephone. About this time, and possibly as a result of the latter inquiry, Wester of PFEL told Page to tell Hansen that PSI was not a member of AFBO and should not receive copies of AFBO circulars. Hansen nevertheless continued to treat PSI as a member of AFBO, and cleared another rate request for PSI in January, 1963—without disclosing in his telegram to Page, however, that the request originated with PSI. Copies of all bulletins continued to go to PSI, although after December they did not carry the names of the distributees. Finally, on March 11, 1963, notwithstanding the intervening events hereinafter described, Hansen personally drafted a memorandum asking PSI (together with Isbrandtsen, Lykes and USL) to advise their position on a sheet of AFBO Rate Committee recommendations (Exh. 42).

27. Notwithstanding the October "edict" of the Director General of Commerce that fourth quarter cement must be carried in "conference liners", PSI concededly had no difficulty in securing fourth quarter business, and everything went smoothly through December 1962 and January 1963. Toward the end of January, however, Georgelis heard from his agents in the Far East that PSI was not considered to be an "AFBO liner", and was going to be eliminated as a cement carrier by the Director General. Georgelis also read all about the challenge to PSI's conference status in the AGAFBO bulletins he received. These included the following:

Bulletin dated February 6, 1963 (Exh. 5), containing the following cables:

Cable from "member line's" Far East agent reporting that Director General is taking stand to shut out PSI because of its non-conference status, and that in order to support his position with U. S. Operating Mission it would "greatly help" if Page would cable the Director confirming that PSI is not a member of the "group".

Cable sent February 1, 1963 (by Page) to Director General, Fagan of AID, and Klauburg (of USL, the then chairman of the AFBO Japan group) at Yokohama: "For your infor(mation) Pacific Seafarer Inc. are not repeat not member AFBO."

Bulletin dated February 7, 1963. (Exh. 6), containing copy of cable dated February 5, 1963, from Klauberg: Received advice that Director General is apparently cancelling all PSI bookings "and while naturally pleased (by) this information would appreciate being informed as to basis on which this action taken as our understanding (is that) only U.S. registry and not AFBO membership necessary in order qualify for U.S. portion (of) AID shipments."

On January 29, 1963, SML sent its Far East agent the following cable, which sums up the situation at that time, at least as far as SML was concerned (Exh. 34):

NOW DEVELOPS THAT PACIFIC SEAFARERS ARE OFFICIALLY MBR'S OF AGAFBO THIS AGREEMENT APPROVED UNDER FMC AGREEMENT 8086 AND COVERS MSTS MATTERS ONLY AND IS MADE UP ONLY OF ATLANTIC AND GULF OPERATORS. INTERPORT RATE TARIFF IS UNDER JURISDICTION OF AFBO AND COVERS FOREIGN TO FOREIGN MOVEMENTS THEREFORE DOES NOT REQUIRE FMC APPROVAL AND AFBO IS MADE UP OF AMERICAN LINES FROM ALL COASTS WHO ARE INTERESTED IN INTERPORT TRADE MBR'S AS LISTED IN TARIFF AND PACIFIC SEAFARERS IS NOT RPT NOT A MBR OF THIS GROUP. ALL OTHER AFBO MBR'S CABLING THIS INFO THEIR AGENT YRS AND SAIGON AND WE SHLD EXPLAIN TO DIR OF COMMERCE THAT THEY ARE NOT MBR'S AND THEREFORE CANNOT BE CONSIDERED AS LINER OR BERTH OPERATOR AND THEREFORE ARE INELIGIBLE PARTICIPATE CEMENT BIZ. OF COURSE NOT BEING MBR'S THEY FREE QUOTE ANY RATE THEY WISH AND IF DIREC'TOR INSIST ON USING THEM IMPORTERS SHLD GET TRAMP RATE AND NOT PAY AFBO RATE. IF PACIFIC SEAFARERS SHLD APPLY FOR MBRSHIP AFBO WILL HV TO DECIDE HOW HANDLE BUT OUR FEELING BETTER HV THEM IN THAN OUT PROVIDED THEY WILL LIVE UP TO OUR RATES AND REGULATIONS. WUD HATE TO SEE LINES SHUT OUT FUTURE SHPTS ALSO APPEARS WC WILL HV 3 VSL'S BACK IN YR AREA MARCH. (Emphasis supplied)

28. After receiving the AGAFBO bulletins dated February 6, 1963, and February 7, 1963, Georgelis consulted his Washington counsel and decided he should join WCAFBO, because he "felt that this was the only remaining group to join to qualify as an AFBO carrier So I felt that in order to continue trading, I had to also belong to WCAFBO". (He did not remonstrate with Hansen, who had treated him as an AFBO carrier; and he continued to receive the AGAFBO-AFBO bulletins.) Georgelis also wrote immediately to his new agent in Saigon, Plantation des Terres Rouges; the letter was not produced, but the agents cables and letter in reply were introduced (Exhs. 7, 8, 9). The agent's letter, dated February 20, 1963, reports that the agent has visited the

Director General and AID manager at USOM to show them copies of documents (evidently papers establish PSI's membership in AGAFBO—Exh. 7) which Georgelis had sent. It further states:

As you know (the Director General) had first decided that transports of cement should be instructed to liner vessels and the 8th of February he signed a circular addressed to all the representatives of cement suppliers in Saigon stipulating that shipments of cement should be done (on) liner vessels belonging to the AFBO Conference.

All those decisions seem to have been taken on the recommendation of the importers which have likely been suggested by our competitors.

The principal arguments raised against us are that:

- 1.) We are only member of the AG/AFBO as MSTS carrier.
- 2.) Our liner service does not satisfy the importers particularly because we do not pay the claims addressed to us.
- 3.) We do not respect the AFBO tariffs for the General cargo.
- 4.) The Central Trust of China along with the Taiwan Cement Corporation reserve to the Pacific Seafarers a great part of their cargo and were consequently suspected to receive rebates.

The agent goes on to say that the Director-General and AID manager will not, as a result of the visit, object to PSI's participation in the transport of cement "provided that also belong to the WC/AFBO. However we felt that pressures have been made on the importers in order that they boycott the s/s "ANJI" as well as the s/s Southport. We think that all those attempts can only be fruit-

less and will not prevent you to continue your regular service as planned."

In response to his counsel's questioning at the hearing, Georgelis denied at some length the second and third "arguments" against PSI listed in the above letter (Exh. 9), but was not asked and said nothing about the suspected rebates to Taiwan Cement Corporation. Taiwan Cement Corporation had approached PFEL with a suggestion that lower rates involving rebates and excess commissions would put PFEL "on a competitive basis".

29. Georgelis had already received the substance of the above letter in cables from the agent. One of them, dated February 14, reported that the Director and AID considered "only WCAFBO and AFBO Yokohama" could cover the Taiwan-Viet Nam AID trade. Another, dated February 15, said the "U.S.O.M. or Direcom" considered PSI able to carry cement provided it was a member of "West Coast AFBO", and suggested that Georgelis "arrange accordingly". Thereafter, Georgelis telephoned Page at San Francisco and inquired about WCAFBO membership. Page told him he would have to have an MSTS contract because all the other members had MSTS contracts. Georgelis then contacted MSTS and submitted an application for an MSTS contract. He was awarded a contract, restricted to traffic between Formosa (Taiwan) and South Viet Nam. This was in effect a blanket contract setting forth terms; it did not provide for any particular shipment, and PSI has never carried anything under it.

30. During his talks with MSTS Georgelis learned that two companies were objecting to his being given an MSTS contract. Later, in an AGAFBO bulletin dated February 21, 1963, he received a copy of a telegram which certain of the members of WCAFBO (who are also AFBO respondents) had sent to MSTS on February 15, 1963 (Exh. 11):

DURING THE RECENT MEETINGS BETWEEN OUR REPRESENTATIVES AND CAPTAIN HECK, LANE KENDALL AND OTHER MEMBERS OF YOUR STAFF ON JANUARY 29 and 30, THE QUESTION WAS RAISED CONCERNING A REQUEST MADE BY PACIFIC SEAFARERS, INC. FOR AN MSTS FAR EAST INTERPORT CONTRACT STOP THIS COMPANY ONLY RECENTLY ENTERED THE INTERPORT TRADE AS A TRAMP OPERATOR BETWEEN TAIWAN AND VIETNAM STOP DURING THIS PERIOD OF TRAMP OPERATIONS, THIS COMPANY DID ADVERTISE ITS SAILINGS OF THEIR VESSEL, THE SS ANJI FOR A PERIOD OF TIME STOP IN RESPONSE TO OUR INQUIRY, WE WERE ADVISED BY MEMBERS OF YOUR STAFF THAT NO CONTRACT HAD BEEN ISSUED TO PACIFIC SEAFARERS, AND IT WAS OUR FURTHER UNDERSTANDING THAT SUCH A CONTRACT WAS NOT GOING TO BE GRANTED AS IT WAS WITHIN THE PREROGATIVE OF MSTS TO DETERMINE THE NEED FOR AN ADDITIONAL SERVICE STOP WE WISH TO POINT OUT IT IS OUR OPINION THAT THE TYPE OF SERVICE BEING OFFERED BY PACIFIC SEAFARERS INC. IS NOT THE TYPE OF ESTABLISHED REGULAR AMERICAN FLAG BERTH SERVICE IN THE FOREIGN TRADE OF THE UNITED STATES WHICH THE ORIGINAL DEPARTMENT OF DEFENSE DIRECTIVES SAID WOULD BE PATRONIZED BY MSTS STOP AS YOU ARE AWARE OUR MEMBER LINES AS WELL AS THOSE OF THE AGAFBO ARE UTILIZING PRINCIPALLY FAST MODERN VESSELS STOP IT IS RESPECTFULLY REQUESTED THEREFORE THAT THE REQUEST BY PACIFIC SEAFARERS INC. FOR AN MSTS INTERPORT CONTRACT BE DENIED. FOR AND ON BEHALF OF: AMERICAN MAIL LINE, LTD.; AMERICAN PRESIDENT LINES, LTD.; Isthmian Lines, Inc.; Pacific Far East Line, Inc.; States Marine Lines, Inc.; States Steamship Company; Waterman Steamship Corporation

In the same AGAFBO bulletin was a copy of the reply of MSTS (Washington) dated February 18, 1963, stating that MSTS had reviewed the protest and found nothing of substance to preclude granting an interport contract to PSI; and that PSI had "met all qualifying requirements" and would be granted an interport shipping contract covering Formosa and South Viet Nam ports.

31. The "protest" telegram to MSTS resulted from a conversation between Wester of PFEL, Noonan of Waterman, and a contracting officer of MSTS in the course of rate negotiations with MSTS, when it developed that the award of a contract to PSI was under consideration. The

contracting officer either requested that the WCAFBO operators address a communication to MSTS giving their reasons why PSI was not entitled to an MSTS contract, or stated that MSTS would withhold its final decision while the operators made their feelings known.

32. February 21, 1963, Georgelis telegraphed Page (Exh. 71) to say that MSTS had been approved for a MSTS contract; that PSI understood membership in AGAFBO to mean membership in AFBO, but in view of "WCAFBO" advice to DIRECOP and AID that PSI was not a member of AFBO and advice from PSI's agents that it was necessary for PSI to join WCAFBO, PSI was submitting its application for membership in WCAFBO "and also membership AFBO with the understanding such membership includes becoming a party to quote memorandum number two of agreed rates to be charged on Far East interport cargo unquote issued as of July 1, 1962 stop Pacific Seafarers Inc. agrees to sign this tariff and abide by the rates, terms and conditions specified therein upon acceptance of this application." A meeting at San Francisco on February 25, 1963 with "Secretary and membership or objecting parties" was requested in the event of any question regarding the application.

33. PSI's counsel had met with AID officials in Washington February 15, 1963, with the result that Washington was then cabling AID in Saigon to the effect that under AID policy all American flag vessels qualified equally within the categories of liner, tanker and tramp, and no conference membership was required as a condition to carrying AID cargo; and all this was made known to Page (Exh. 91). Nevertheless, on or about February 20, 1963, Page sent the Director General of Commerce at Saigon the following cable—a copy of which was duly transmitted to Georgelis in an AGAFBO bulletin dated February 21, 1963 (Exh. 11):

REMYTEL 2/1 IN REFERENCE TO THE PACIFIC SEAFARERS INC. WE WISH TO ADVISE THAT IT IS AN UNDERSTANDING THAT THIS COMPANY HAS OBTAINED MEMBERSHIP IN THE ATLANTIC & GULF AMERICAN-FLAG BERTH OPERATORS WHICH ORGANIZATION PERTAINS ONLY TO THE CARRIAGE OF MILITARY CARGOES. WE WISH TO STATE ALSO THAT THE PACIFIC SEAFARERS INC. ARE NOT A MEMBER OF THE WEST COAST AMERICAN FLAG BERTH OPERATORS WHICH IS THE WEST COAST COUNTERPART OF THE ATLANTIC & GULF AMERICAN-FLAG BERTH OPERATORS AND AGAIN IS ONLY CONCERNED WITH MILITARY CARGOES. FURTHER AND MORE SPECIFICALLY PACIFIC SEAFARERS INC ARE NOT A MEMBER OF THE AMERICAN FLAG BERTH OPERATORS (AFBO) WHICH HAS A PUBLISHED TARIFF OF AGREED RATES ON FAR EAST INTERPORT CARGO AND WHICH MEMBERSHIP CONSISTS OF THE FOLLOWING LINES, NAMELY: AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES, LTD., ISBRANDTSEN COMPANY, INC., Isthmian Lines, Inc. LYKES BROS. SS CO., INC., PACIFIC FAR EAST LINE, INC., STATES MARINE LINES, INC., STATES STEAMSHIP COMPANY, UNITED STATES LINES AND WATERMAN STEAMSHIP CORP., HOPEFUL THIS WILL CLARIFY ANY MISUNDERSTANDING YOU MAY HAVE.

PAGE.

34. PSI was duly admitted to "membership" in WCA-FBO on March 4, 1963, and paid its dues.

35. As to AFBO membership there was some delay, because (as Georgelis was told) two "key representatives" of member lines (PFEL and Waterman) were out of town, and also because AFBO had no mechanism for handling application; all the present members were charter members or corporate successors thereof, and no application for membership had been processed before. A meeting of the AFBO respondents was held March 19, 1963, at which it was decided to ask PSI for certain information as to its corporate set-up and operations, as was usually done by conferences, and on March 20, 1963 Page sent such a letter to PSI, to which a reply was received on or about March 28, 1963. At a meeting on April 8, 1963, it was unanimously voted to offer membership to PSI. PSI was notified forthwith, but its attorney requested a meeting before it accepted the offer; and a meeting was arranged for April 15, 1963, at San Francisco.

36. Meanwhile, possibly as a result of advice from AID in Washington to its Saigon representatives to the effect that AID did not recognize any requirement of conference vessels, or possibly as a result of "pressure" exerted by PSI's new agent (a former schoolmate of the Director General), PSI was having no trouble booking first quarter cement on account of its non-conference status, and had in fact doubled its sailing schedule. Georgelis conceded that at no time was PSI actually found ineligible to carry cement, and that the Director General's order in the fall of 1962 and again in early 1963 requiring conference liners was rescinded or satisfied in some way so that it did not affect PSI.

On March 5, 1963, PFEL's Taiwan agent wrote that PSI had booked 8,000 tons of cement for March "for obvious reasons"; and that the "worst situation" was that they and the owners of *Chicot* were still canvassing for steel and general cargo and would shut out part of the cement (and in the case of *Chicot*, fertilizer) if necessary to carry the better-rated cargo; and "due to beneficial terms offered by both *Anji* and *Chicot*", most shippers would not make any firm bookings with AFBO liners until after those two vessels sailed (Exh. 70). (*Chicot* was operated by Jones & Guerrero who had the same agents in Taiwan as did PSI; *Chicot* had obtained a "basic parcel" of fertilizer, as PSI had obtained "the basic parcel" of cement). PFEL's agent closed with the hope that PFEL would "realize the situation here and introduce the remedying measure as suggested" in a cable which it had sent to PFEL on March 1—a suggestion that "AFBO immediately declare cement rates open as counter measures" to PSI's using cement as basic load and then "grabbing general cargo" (Exh. 77).

37. At the AFBO meeting of March 19, 1963, at which PSI's application for membership was discussed, there was a discussion of opening the rates on cement and fertilizer,

apparently upon the request of PFEL. Those present (being all the AFBO respondents except Lykes, USL, and Isbrandtsen) agreed to permit the opening of these rates. The members not present were canvassed by telephone, and all agreed, the last concurrence being obtained March 21, 1963. On that date Page cabled Klauberg, the "honorary chairman" of AFBO at Yokohama, to establish open rates immediately on fertilizer and cement, Taiwan to Viet Nam, and on cement only, Thailand to Viet Nam, on all business not previously booked (Exh. 83).

38. Also during the interim between PSI's AFBO application and AFBO's offer of membership, Hansen of AGAFBO personally drafted a memo to "Far East Lines", attaching a list of AFBO rate committee recommendations, and asking Pacific Seafarers (as well as Isbrandtsen, Lykes and USL) to "advise their position no later than March 13" (Exh. 42). On March 28, Hansen wrote all Far East Lines asking them to have AFBO deal directly with them in the future "on matters relating to AFBO problems other than those involving military cargo", ostensibly because Hansen's office was now too busy to act as a clearing office for such AFBO matters.

39. On April 15, 1963, Georgelis and his counsel met with respondents' representatives at San Francisco. PSI refused to join AFBO unless (1) the group was completely formalized, (2) its agreement was filed with the Commission, and (3) the rates on cement and fertilizer were closed. The condition of formalizing the group was acceptable to all. Filing with the Commission was not acceptable because it was felt that this was a foreign-to-foreign matter outside the Commission's jurisdiction. It was not agreed to close the rates, because, according to Wester of PFEL, many of the lines had put out bids. Georgelis "didn't want to join the group and find out the rates were still open and it was dog eat dog". PSI has never accepted the offer of membership in AFBO. Four days after the San Francisco meeting the complaint herein was filed.

40. Meanwhile, following the opening of rates by the AFBO carriers, the Director General in Saigon had inaugurated a new procedure by calling for bids to carry the second quarter cement. The AFBO rate had been \$8.95 per long ton from Taiwan and \$8.42 per long ton from Siam. The record is not complete as to the bidding. PSI bid \$6.25 per long ton from Taiwan, a reduction of about 30%; however, SML bid about \$5.54 per long ton (\$5.50 per metric ton, which is 2204.6 lb. against 2240 lb. for a long ton) from Taiwan, a reduction of about 38%, and was awarded the business. Georgelis testified that he bid \$6.15 per long ton from Bangkok; however, PFEL was apparently the low bidder at \$6.152 per metric ton (a reduction of about 26%), so PSI's bid must have been a little higher (Exh. 130). The confusion may have been due to the fact that parcels awarded to PFEL were actually carried by PSI, which met PFEL's price and was awarded the business when PFEL was unable to provide space at the times specified.

41. Although SML's vessel expense was not fully covered by the revenue (over and above cargo, port and brokerage expense) from its second quarter cement voyages, SML had vessels operating in the Far East at that time with no other immediate employment and considered the second quarter business profitable and advantageous, and therefore bid lower on the third quarter cement to insure that it got the business. SML was the low bidder and was awarded the entire third quarter tonnage from Taiwan at \$4.96 per metric ton, and the August shipments from Thailand at \$6.00 per ton; while PSI was awarded the September and October shipments from Thailand at \$6.22 per ton.

42. For the fourth quarter 1963 cement, PSI was awarded 19,200 out of 32,000 tons from Taiwan, at \$5.95 per metric ton.

43. USL and Lykes have resigned from AFBO, USL on May 1, 1963, and Lykes on November 12, 1963.

Discussion and Conclusions

Although much of the record is devoted to alleged efforts of respondents to have complainant disqualified as an AID cement carrier by the Director General of Commerce of South Viet Nam, complainant's president conceded that it was not actually found ineligible to carry the cargo and was not affected by the Director General's orders, which were rescinded or otherwise satisfied. Likewise, respondent's effort, in the form of a protest to MSTS officials, to prevent complainant from obtaining an MSTS contract had no adverse effect—the contract was awarded four days later, and complainant was not damaged by the delay. As for the membership fees paid AGAFBO and WCAFBO, complainant solicited membership in both those organizations, and was not led to believe by any act of respondents that such membership was necessary to enable it to obtain AID cargo, or for any other purpose. Complainant suffered no loss or damage by reason of any act of respondents prior to the opening of rates on cement and fertilizer in the spring of 1963. Complainant did not carry any fertilizer prior to the opening of rates, and beyond the fact of the opening there is no evidence concerning fertilizer rates or the impact thereof on complainant. The reduced cement rates and any consequent decrease in revenues, and the alleged loss of contracts in the second quarter of 1963 when complainant was not the low bidder, resulted not from concerted action by respondents, but from complete lack thereof—from the cancellation or abandonment of a rate fixing agreement and the consequent restoration of unrestricted competition with respect to the only rates which are claimed to have affected complainant adversely. There is no suggestion that the rates were fixed by agreement after they had been opened; in fact complainant's president characterized the open rate situation as "dog eat dog", and rejected tendered membership in AFBO because respondents refused to restore the um-

brella of agreed rates which had afforded complainant such profitable protection.

Still, in a case of this kind, each act of respondents should not be treated as a completely separate episode; complainants "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each". *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699; and cf. *Unapproved Sect. 15 Agreements—South Africa Trade*, 7 F.M.C. 159, 182. Another reason to consider the pertinent events in their relation to one another has to do with complainant's contention that the Commission had jurisdiction of respondents' foreign interport activities because they were inextricably connected with improper utilization of agreements filed with and approved by the Commission. The activities of complainant are among the relevant circumstances to be considered. *United States Navigation Co. v. Cunard S. S. Co.*, 284 U.S. 474, 485.

One of several unusual features of this proceeding is that before respondents commenced their alleged scheme to eliminate complainant's competition, complainant, together with its affiliate Seafarers, Inc., had just about eliminated the competition of respondents. The only two respondents that appear to have been substantial cement carriers —PFEL and SML—obtained none of that business for six months following complainant's initial voyage. Even with the recognized ease of market entry characteristic of ocean common carriage, this was an impressive accomplishment. It was not done by complainant alone. Complainant was launched in the trade as a "regular liner service" alongside Seafarers, Inc., a tramp operator. Complainant quoted the agreed rates established by AFBO, which would ordinarily be called conference rates. Seafarers, Inc. charged lower rates. Thus their common stockholder was in a position to meet the trade's requirement for liner service

at "conference" rates, or tramp service for less; Georgelis had undoubtedly learned from Ohl, the Saigon agent with whom he discussed the venture originally, that the demand had shifted from one to the other from time to time. Ohl's letter prepared for Georgelis's use to "expound (his) case to Washington" describes the order of succession as "foreign liners, foreign tramps, U. S. liners, U. S. tramps, U. S. liners again, U. S. tramps and now U. S. conference liners" (finding no. 10). Ohl's letter is directed against the Director General's requirement of liners, and not merely of "conference liners"; it points out that (prior to complainant's entry into the trade) "for two years, everyone seemed happy with U. S. tramps (West Coast Shipping Company) then liners were requested to limit the arrivals." It then proceeds to disparage the idea that the use of liners limited arrivals. This approach is consistent with the then-existing situation; prior to the Director-General's "directive", Ohl and Georgelis had succeeded in having the current quarter's cement carried by the tramp operator, Seafarers, Inc., to the exclusion of respondent liner operators as well as of complainant. Georgelis had reason to prefer that arrangement, although it affected the complainant corporation more drastically than anything done by the respondents: effective September 10, 1962, it had put complainant completely out of business. It is not unreasonable to conclude that had the Director General not required a return to the use of liners (he specified "conference" liners, but complainant was not actually affected by that part of the specification) complainant would have remained inactive and Seafarers, Inc. remained the dominant cement carrier. As it was, complainant returned to the scene to carry "fourth quarter" cement and doubled its sailings in January, 1963, while Seafarers, Inc. faded out of the picture; the record does not disclose any activity in the trade by Seafarers, Inc. after the revitalization of PSI.

The swing back to liners at the end of 1962 did not harm the Georgelis enterprise, but merely switched its operations from Seafarers, Inc. to Pacific Seafarers, Inc.; and it did not benefit the two interested respondents substantially. SML moved a few parcels, but PFEL remained out of the running. Complainant, with its old 10-knot Liberties, continued to take most of the business away from the newer, faster, established vessels of respondents, while ostensibly conforming to their rates. Granted Georgelis's ability, aggressiveness, industry and undoubted personal charm, complainant's performance was unusual. PFEL believed it was done with the aid of rate cuts in the form of excess commissions, or rebates; Taiwan Cement Corporation had approached PFEL's agent with a suggestion involving rebates and commissions. SML thought in November 1962 that PSI was quoting "independent" rates, possibly confusing Seafarers, Inc. with PSI. In March 1963 PFEL's Far East agent reported that Taiwan shippers would not book ahead with AFBO liners due to "beneficial terms" offered by PSI's *Anji*, and at about the same time SML's Taiwan agent suggested to its home office that if PSI continued to get the lion's share after being admitted to AFBO, the rates be cut to force their retirement and "end monkey biz". Complainant introduced a letter from its Saigon agent reporting that The Central Trust of China and the Taiwan Cement Corporation were "suspected to receive rebates"; and although Georgelis denied all the other contentions reported in the letter to have been directed against PSI, no comment was made with respect to the suggestion of rebates. The inference is inescapable, and it is so found, that PSI extended to some or all cement shippers some form of financial inducement more favorable than was provided by the AFBO Rate Agreement which PSI purported to follow.

There was some justification for respondents to regard complainant as a tramp operator, not only in their telegram to MSTS of which PSI complains, but in their inter-

company communications. The only difference between complainant and its tramp affiliate, at the outset at least, appears to have been that complainant advertised its service in Chinese-language advertisements inserted in a Taiwan newspaper, and its affiliate presumably did not. Complainant's operation was of the kind contrasted with regular liner service in the Senate committee report issued August 31, 1961, in connection with the then-pending "dual rate" bill:⁴

"Whereas it costs a great deal to set up and operate a regularly scheduled liner service, in comparison it costs very little to charter a vessel, advertise in the port's trade paper, hire a broker or agent on a commission basis and, when business is good, operate a regular service."

Complainant's "regular service" was not even aimed at normal good business, but concededly was inaugurated solely to take advantage of AID cargoes financed by the United States government, which carry higher freight rates and are shielded from foreign-flag competition.

On September 10, 1962, after complainant had operated for about two months, it stopped its service entirely for nearly three months—not because of the machinations of respondents (and complainant does not so allege), but because it had released its only vessel in the trade, the chartered *Anji*, to its affiliated corporation to carry out the latter's tramp commitments.

It was during this hiatus in complainant's operations that the Director General specified "conference liners" to carry the next quarter's supply of cement. There is no doubt that the agent of at least one respondent—PFEL—was doing his best to get liners specified, though there is no evidence that he used any tactics which were illegal by any standards, or that there was a joint effort by respondents.

⁴ Senate Report No. 860, 87th Congress, 1st Sess., at p. 5.

It seems unlikely that respondents were responsible for the specification of *conference* liners. They did not look upon AFBO as a conference, although it had the characteristics of at least some conferences other than those operating under the Act in trades to and from the United States.⁵ It is more likely that the Director General thought of the AFBO liners as distinguished from tramps; if anybody asked him why he used the word "conference", and what he meant by it, the record does not provide the answer. One would have expected the respondents to seek a more definite, unambiguous specification; in fact, when PSI's agent was pressing for withdrawal of the edict on the ground that it was a nullity because there really wasn't any conference, one of the AFBO members found it necessary to provide its Far East agent with arguments to counter the admitted fact that AFBO was "technically" only an agreement and not an "official conference" (finding no. 20). At the time complainant was not operating a liner service, and as far as respondents were concerned it never had. It is concluded that the specification of "*conference*" liners was not pursuant to any joint effort of respondents, although subsequently certain of the AFBO respondents tried—without success—to take advantage of the specification in an effort to regain the business lost to complainant.

The next series of events, which culminated in PSI's becoming a party to the AGAFBO agreement, came about through the lucubrations of Georgelis and his counsel. They discovered the AGAFBO and WCAFBO agreements

⁵ In *International Shipping Cartels*, Professor Marx states, at p. 142, that "the restrictions of the Shipping Act of 1916 may well have had an influence which renders agreements in American trades unrepresentative of those for other ports of the world." In the introduction, at p. 3, speaking of shipping conferences generally, he points out that "(t)he nature of their organization varies considerably, depending on the market structure of the trade route. Some have been conferences quite literally—informal oral conferences—but many have employed written agreements establishing a permanent body with a chairman or secretary, and containing carefully described rights and obligations of the conference membership."

in the files of the Commission in Washington, and Georgelis reached the conclusion, without reliance on any representations of any respondent, that joining AGAFBO made PSI qualify as a conference member, although Georgelis admittedly knew that the approved AGAFBO and WCAFBO agreements did not relate to AID cargo.

After Georgelis had joined AGAFBO, Hansen, the AGAFBO secretary, proceeded to give him every reason to believe that PSI was in fact a member of AFBO, getting his concurrence on AFBO rate changes and even putting through two PSI requests for agreement as to rates. But Hansen was living in a world of his own. Even after his office had ineptly relayed to PSI communications denying that PSI was an AFBO member, and while PSI's first definite application to join was pending, Hansen personally drafted a request to PSI to approve a sheet of AFBO rate recommendations, which was sent out on March 11, 1963. Hansen testified that he had no knowledge of what AFBO did beyond the communications that came to his office, and he quite obviously didn't read all of those. His conduct is quite inconsistent with the claim that AGAFBO and AFBO were one and the same thing, and that the AFBO rate agreement was the agreement of all the AGAFBO members. The members of AGAFBO who were not on Hansen's Far East Lines mailing list did not even have Hansen's limited opportunity to know what AFBO was about. They did not receive copies of Hansen's AGAFBO bulletins relating to AFBO affairs, and did not participate in or, as far as the record shows, have any knowledge of any of the agreements or activities, actual or alleged, of which PSI complains. As far as AFBO and the Rate Agreement were concerned, Hansen was, as respondents contend, merely a conduit that carried whatever got into it. Perhaps this ministerial function enhanced the status of Hansen and his organization, something with which Page, his "opposite number" in WCAFBO, was loathe to interfere. Whatever the explanation, Hansen's actions can-

not be reconciled with complainant's contention that the Rate Agreement and other Far East activities of the AFBO respondents were acts of AGAFBO and its members (i.e. the participants in Commission Agreements No. 8086 and No. 8750) as such. None of the Far East activities complained of were in furtherance of, or had anything to do with, the said approved Commission Agreements or any unapproved modifications thereof.

Although there were numerous instances of confusion of the various alphabetical labels attached to the different activities of American flag berth operators, the association of Matson Navigation Company and Puget Sound-Alaska Van Lines in the approved WCAFBO agreement relating to MSTS rates (Commission Agreement No. S186) does not connect them with the Far East activities with which the complaint is concerned. Like the AGAFBO members outside its Far East group, they did not participate in or, as far as the record shows, have any knowledge of anything of which PSI complains. As associate members of the approved WCAFBO agreement they were specifically excluded from voting in any affairs of that organization having to do with matters outside their respective U.S.-Hawaii and U.S.-Alaska trades. It is quite true that a conspirator may be liable for acts of his co-conspirators in furtherance of a conspiracy even though he does not participate in, approve of or even know about such acts; but he must first have been found to be a party to the conspiracy. There is no evidence whatever that Matson and PS-AVL were parties to any agreement or understanding except Commission Agreements No. 8186 and No. 8750, as filed and approved. None of the Far East activities complained of were in furtherance of, or had anything to do with, those approved agreements or any unapproved modifications thereof, with the exception of the telegram to MSTS (Exh. 11, finding no. 30), which is found not to have been in violation of the said approved agreements or to constitute a modification thereof. The telegram is a statement to the Commander,

Military Sea Transportation Service (COMSTS) of reasons why, in the opinion of the seven MSTS contract holders who signed it, PSI's application for an MSTS contract should be denied. It cannot be said to have been maliciously or even knowingly false, and was not the kind of activity upon which a violation of the Act can be predicated. Cf. *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127.

The AFBO respondents,⁶ however, were parties to the Rate Agreement, which was certainly a violation of section 15 if it was within the Commission's jurisdiction, since it fixed transportation rates and was neither filed nor approved. But the purpose and effect of the Rate Agreement were not to exclude anyone from the interport trade, as witness the ease with which Georgelis entered the trade. It had no purpose, so far as the record shows, beyond that of fixing uniform rates for American flag operators in the interport trade. When questions arose as to whether PSI should be admitted to participation in the Rate Agreement or was in fact a "member" of AFBO, and as to whether the current rates should be opened because of PSI's competition, all the participants were necessarily called upon to discuss the situation and ultimately to vote, although (except for PFEL and SML) they had little or no direct interest. In finally voting to open the rates as PFEL insisted, they were following one of the usual courses of rate-fixing conferences where competition makes it impossible to maintain an agreed rate. However, it was not the Rate Agreement, or any "related agreement", or even the opening of rates that harmed PSI, but the rates which were independently established following the opening. Here two factors are most significant: first,

⁶ For the reasons set forth in footnote 3 (finding no. 15) American Export Lines, Inc., should be considered as an AFBO respondent for the purposes of this discussion, because of the activities, after June 1, 1962, of its Isbrandtsen Division; but Isbrandtsen Company, Inc., need not be so considered.

respondents did not fix abnormally low rates by agreement⁷ but opened them to competition among all carriers; and second, the rate that complainant offered immediately after the opening was drastically lower than the rate he had previously offered, ostensibly at least. Who can say that it was right for PSI to cut its quotation by 31%, but wrong for SML to cut its rate by 38%? If SML and PFEL had not made even more drastic cuts than complainants, PSI would still have succeeded in excluding them from the cement business.

That PFEL would not have been unhappy to see PSI out of the foreign interport business does not mean that the other respondents, in acceding to its request to open the cement rates, were parties to an agreement or understanding to put complainant out of business; and upon consideration of all the surrounding facts and circumstances, it is concluded that they were not.

The allegation of the complaint that the use of the Rate Agreement and AFBO was unreasonably prejudicial to complainant in violation of section 16 First is not borne out by the record. The only conclusion proposed by complainant with respect to section 16 First is that it was violated by the cement rates charged upon the opening of the rates. It would indeed be novel to hold a carrier in violation of section 16 First because it had underbid a competitor—particularly where, as here, the competitor itself had bid 30% less than the prior going rate.

To find a cause of action under the Act here (assuming jurisdiction) we must conclude that an agreement to open rates which have been fixed by an illegal agreement, where the particular rates so opened to competition are selected with the knowledge that to open them will probably harm

⁷ Which the Commission's predecessor found, in *Seas Shipping Co., Inc. v. American South African Line, Inc.*, 1 U.S.S.B.B. 568, 584, to be legitimate economic warfare, assuming an approved agreement permitting the fixing of rates.

a competitor more than it will harm the parties so opening the rates and possibly put the competitor out of business through the restoration of unrestrained competition, is in itself a violation of the Act unless filed and approved. This leads to several logical difficulties, particularly where, as here, the person seeking relief claims to have been a participant in, and expressly agreed to be bound by all the terms and conditions of, the illegal rate-fixing agreement. Of course complainant, since it was not a carrier subject to the Act, could not itself have violated section 15; but the Commission can hardly overlook the obvious fact that if there was jurisdiction under the Act, there must have been jurisdiction—though not in the Commission—under the antitrust laws, and that complainant openly agreed to the very price-fixing which, as it says in its brief, is illegal per se under the Sherman Act. If the opening of rates was a violation of the Act, it was so only because it was incidental to an illegal rate-fixing agreement, in which complainant participated. Having participated in the illegal undertaking, complainant could not recover even if it could show damage; for where parties stand in pari delicto, the law leaves them where it found them. *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F. 2d 967, 971, and cases there cited. It is no answer that complainant was compelled against its will (and it is by no means clear that there was any effective compulsion) to enter into such an agreement in order to stay in business under the Director General's decree; business expediency does not excuse violation of the law.⁸ Complainant was at all times acting under the advice of counsel, who visited the Commission's office to find some "conference" that might fit the Director General's reported edict. Although it was apparent to Georgelis and his counsel that the approved AGAFBO and WCAFBO agree-

⁸ A truism recently noted in the Commission's decision in Docket No. 1115, *Application for Forwarding License Dixie Forwarding Co., Inc.*, dated April 21, 1964.

ments had nothing to do with interport AID rates, they did not suggest to the Commission that a violation of the Act might be afoot, but instead had PSI rush headlong into what is now contended to have been a series of illegal agreements. The inevitable conclusion is that neither complainant nor respondents ever considered seriously that the Rate Agreement or any of the alleged "related agreements" might be within reach of the antitrust laws or the Shipping Act, 1916, until complainant adopted that contention after the rate on cement had been opened.

In denying the pre-hearing motions to dismiss the complaint for lack of jurisdiction, the Commission, assuming all the allegations of the complaint to be true for the purposes of the motion, stated:

"The complaint alleges discrimination against a United States flag carrier by United States flag carriers. The trade involves United States government agencies shipping cargo financed by the United States, and includes the cargo in the trade from the United States to ports in the Far East which is transshipped in the Far East. The jurisdictional issue involves important questions of law and fact which should be determined only on a complete record."

The record reveals no discrimination by respondents against complainant (the complaint alleged that PSI had not been admitted to the AFBO "conference", but omitted to mention that membership had been offered and turned down). Also, the trade in issue does not actually involve cargo owned or shipped by the United States or its agencies. More important, complainant has necessarily abandoned its claim of jurisdiction based upon a trade in goods originating in the United States and transshipped in the Far East, since the record shows complainant's business to consist exclusively of foreign interport shipments of local origin. Complainant now relies for jurisdiction principally upon the theory of a scheme carried out through modifica-

tions of agreements filed with and approved by the Commission. It argues that the Commission had jurisdiction over all activities under agreements which the Commission has approved, including matters which would not otherwise be within its jurisdiction; that in respondents' activities in the Far East interport trade they operated under and "used" agreements approved by the Commission; and that therefore such activities were under the jurisdiction of the Commission. Complainant also contends, however, that section 15 applies to *any* agreement of the kind therein described, if it is between *carriers* subject to the Act, because there is nothing in section 15 that limits its scope to trade involving United States ports; and that section 18(b) expressly applies to foreign-to-foreign rates between points on routes to and from the United States. Since these latter contentions, if valid, would dispose of any question of lack of jurisdiction, they will be considered first.

Section 15 does in fact purport to require every common carrier by water (as defined) to file *every* agreement, etc., with any other such carrier, if the agreement fixes rates, regulates competition, etc. The common carriers referred to are (so far as pertinent here) defined in section 1 of the Act as those "engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country". Hearing Counsel, whose position is adopted by respondents, contends that this definition of carriers subject to the Act shows that it was the intent of Congress to limit the application of the Act to commerce between the United States and foreign countries. Complainant points out that the definition in section 1 relates only to the persons, not the commerce, subject to the Act and contends that there is no territorial limitation in the Act itself upon the agreements required to be filed, as long as the carriers making the agreements are engaged in foreign commerce of the United States so as to be subject

to the Act. That is true, as far as the literal language of the Act is concerned; however, even complainant concedes, in its reply brief, that agreements not affecting the commerce of the United States are not, within the intent of Congress, required to be filed.

No decision of the Commission or its predecessors has been found which is not consistent with the position described in the 1962 Report of the Antitrust Subcommittee of the Committee on the Judiciary (87th Congress, 2d Session, House Report No. 1419, pp. 335-336):⁹

"With conferences spanning sealanes between nations all over the world and having many American as well as foreign lines as members, an important ancillary question is presented as to what extent, if any, conference as well as other agreements wholly in foreign international trade fall within section 15 and other prohibitory sections of the Shipping Act.

"Former Chairman Morse took the unequivocal position that discriminatory practices in strictly foreign trade did not fall within the Board's jurisdiction under the Act. It was on this basis that he publicly endorsed the telegraphed reply *** to the complaint *** about discriminatory rates *** which read in part as follows: 'Rates Canada Philippines not subject to Shipping Act, 1916.' Chairman Morse was equally of the view that conference agreements covering the transportation of cargo between strictly foreign powers also lay outside the scope of the Board's jurisdiction under section 15.

⁹ The subcommittee seemed to think it inconsistent that the Board had approved conference agreements which included shipments between Canadian and foreign ports. This Examiner sees no inconsistency; be that as it may, however, it is not relevant here. Such conference agreements covered both the foreign commerce of the United States and the intimately related commerce of Canada. So far as the Canadian foreign commerce was concerned, approval was never claimed to be required, nor was it deemed to have any legal force or effect.

"Chairman Morse did cite one exception to the lack of jurisdiction of the Board over activities of lines engaged in international commerce only, which seemed to support his earlier contention. That was section 14a of the Shipping Act which authorizes exclusion from American ports of foreign-flag lines which refuse to permit United States vessels to participate in wholly foreign conferences that employ deferred rebates or engage in other unfair practices. As Edward Aptaker (Office of General Counsel) observed in commenting upon the inferences to be drawn from this section:

Now, that, it seems to me, emphasizes again the fact in foreign-to-foreign movement we have, first, no jurisdiction, and secondly, it is the policy of the Congress to permit the American-flag lines to engage in what might otherwise be unlawful if it would be in our commerce, so that they can stand on equal footing."

In the Sherman Act case of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, the Court observed (p. 356) that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done", and stated (p. 357):

"The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is *prima facie* territorial. *Ex parte Blain*, *In re Sawers*, 12 Ch. Div. 522, 528; *State v. Carter*, 27 N.J. (3 Dutcher) 499; *People v. Merrill*, 2 Parker, Cirm. Rep. 590, 596. Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that

the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious."

Later Sherman Act cases have held *American Banana* not to be controlling where the activities of the defendants in foreign countries are in furtherance of a conspiracy to monopolize or restrain the domestic or foreign commerce of the United States. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, and cases there cited. The distinction is made in *United States v. Sisal Sales Corp.*, 274 U.S. 269. In that case, although the principal acts took place in Yucatan and Mexico, the fundamental object was control of both importation and sale of sisal into and in the United States, and defendants had secured a monopoly of interstate and foreign commerce of the United States in sisal. In the absence of any effect upon the commerce of the United States, *American Banana* remains the law; as restated in *Sisal* (p. 276), "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law." Similarly, the Shipping Act, 1916, does not extend to agreements merely because they are agreements of the kind described in section 15, if they do not have to do with the commerce of the United States—to quote complainant's reply brief, it is the "stated purpose of section 15 to authorize agreements otherwise illegal under the anti-trust laws which explains the absence of a definition of commerce in the Shipping Act. Congress had in mind the same commerce protected by the anti-trust laws"—citing 53 Cong. Rec. 8080 (1916). To further quote complainant: "When carriers subject to the Shipping Act enter agreements described in section 15, the only reasonable exception which can be found in the mandate that the agreements be filed with the Commission, is that agreements not affecting the

commerce of the United States are not within the intent of Congress."

But here neither the Rate Agreement nor any "related understanding" affected the commerce of the United States. It does not follow that because some agreements may have affected complainant they were agreements "controlling, regulating, preventing or destroying competition" in the commerce of the United States, for complainant was not engaged in, and therefore was not an instrumentality of, the commerce of the United States. Complainant's contention that as an American company operating American vessels employing American seamen, it is "part of the commerce of the United States", is not supported by the cases it cites, which have to do with carriers engaged in interstate or foreign commerce of the United States. Complainant was engaged exclusively in foreign-to-foreign commerce, and its American flag status cannot change the nature of its business, any more than it can make complainant a carrier subject to the Act.¹⁰

Likewise, the fact that the trade in question relates almost exclusively to cargoes the procurement and shipment of which was financed by an agency of the United States cannot convert complainant's business into commerce of the United States. These were cargoes pro-

¹⁰ If it could, complainant, on the strength of its own briefs, would be guilty of almost as many violations of the Act as respondents are claimed to be; but as complainant points out in its reply brief, it was not required to file its rates because it does not furnish transportation to and from United States ports and "as a carrier, it is not subject to section 18(b)". For the same reason, it would not have been required, pursuant to section 15, to file the Rate Agreement to which it claims to have conformed, in whole or in part, even if the agreement related to rates in the commerce of the United States. But if complainant was exempt from the Shipping Act, it could not have been exempt from the Sherman Act if, as complainant contends, the commerce in which it engaged was subject to that law; and complainant claims not only to have conformed but to have been a party to the Rate Agreement. Less than two months before it filed its complaint it telegraphed its agreement "to sign this tariff and abide by the rates, terms and conditions specified therein" (Exh. 71).

cured by foreign importers from suppliers located abroad pursuant to normal commercial practices; they were purely foreign in origin and destination, and AID acted only in the capacity of a financing institution. The role of our Government in providing financial assistance was in no sense part of United States commerce.

It follows that the Rate Agreement published over the names of the AFBO respondents and setting forth agreed rates for Far East interport cargo, and understandings relating to the Rate Agreement or the competition of complainant, were not section 15 agreements within the Commission's jurisdiction, and were not required to be filed as such.

Complainant further argues, however, that section 18(b) of the Act specifically requires all rates between points on respondents' routes to be filed; that therefore the failure of respondents to file their Far East interport rates, including those shown in the Rate Agreement, was a violation of section 18(b) of the Act; and that the interport cement rates charged by PFEL and SML after the agreed rates were opened were unreasonably low and should be declared unlawful under section 18(b)(5) of the Act.

The Examiner ruled before the hearing, on complainant's petition for reconsideration of a discovery ruling, that foreign interport rates, not being "to and from United States ports and foreign ports", are not within the scope of section 18(b). Complainant nevertheless contends that section 18(b) requires a carrier in the foreign commerce of the United States to file tariffs for cargo to and from all ports, both United States and foreign, along all points on its route, if the *route* is between the United States and foreign ports.

The language of section 18(b) is quite clear on this subject, and is further clarified by its legislative history.

Although the bill as passed by the House required a carrier in the foreign commerce of the United States to file tariffs showing rates "for transportation between all points on its own route", the Senate Committee amended this by adding the phrase "to and from United States ports and foreign ports"—following, and clearly modifying, the word "transportation". Thus, as enacted the statute requires the filing of

"... tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established."

If any doubt remains, it is removed in the section-by-section explanation of the Committee amendment in Senate Report No. 860, 87th Congress, 1st Session,¹¹ which says of the section of the bill creating the new section 18(b) of the Act:

"This section would require all ocean common carriers, and conferences thereof, to file with the Commission copies of their tariffs showing their rates, fares, and charges for transportation to and from ports of the United States and foreign ports."

The Commission's practice has been consistent with the express limitation of section 18(b) to rates for transportation between United States and foreign ports. Thus WCAFBO was advised by the Commission, with respect to the filed schedule of Negotiated Rates between MSTS and WCAFBO members, that "rates between foreign ports may be retained in the tariff for information purposes" (Exh. 58).

¹¹ At p. 19 of the report; p. 218 of the Index to the Legislative History of the Steamship Conference/Dual Rate Law, Senate Document No. 100, 87th Congress, 2d Session.

None of the rates with which the complaint is concerned is within the scope of section 18(b) of the Act, since all are for foreign interport transportation; hence none was required to be filed, and none is subject to disapproval under section 18(b)(5) even if it were found to be unreasonably low.

This brings us to complainant's principal argument for jurisdiction, based upon the existence of the AGAFBO and WCAFBO agreements approved by the Commission, and the allegation that respondents' Far East interport activities were carried out by AGAFBO and WCAFBO "as such", so as to give the Commission jurisdiction over such activities as action taken pursuant to approved agreements and modifications thereof. Since the Far East interport activities with which the complaint is concerned were clearly not within the scope of the approved agreements and would destroy complainant's case if they were properly so, there is some difficulty in viewing them as actions pursuant to the agreements for the purpose of conferring jurisdiction. Complainant purports to get around this by calling the agreements to which it excepts modifications and extensions of the approved agreements; thus, the argument runs, acts claimed to have been carried out pursuant to such unapproved modifications and extensions were pursuant to the approved agreements which they modified and extended. The agreements as filed, it is claimed, are not true and complete; but they furnished the "necessary organizational structure and operating procedures for the Far East interport area", for activities pursuant to agreements which, since they are modifications of filed agreements, must be filed.

The basic fallacy in this reasoning is that the Rate Agreement and the alleged "related agreements," and whatever concerted activity there may have been among respondents with respect to Far East interport AID cargoes and complainant, do not modify or "extend" the

filed and approved WCAFBO and AGAFBO agreements in any respect whatsoever. The latter agreements—the filed and approved agreements relating solely to negotiation of rates with MSTS and related shipper services—remain exactly as filed, without change or modification as a result of any other actual or alleged agreement. All the alleged modifications and extensions referred to in the complaint and record and briefs of complainant relate to a different subject matter and do not purport to, and do not in fact, modify, vary or supplement the filed agreements in any way.

Since the approved agreements are not in fact modified or extended by the other agreements, it would make no difference, from the standpoint of jurisdiction, whether the parties to such other agreements were identical (which they were not) with the parties to the approved agreements, or whether they carried out the other agreements with the aid of the same physical organization or "machinery" as was used with respect to the approved agreements. The use of the "machinery" will not make illegal an otherwise legal agreement, any more than it will legalize an otherwise illegal agreement. See *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295. In the latter case, the violation was found to be not in the use of the "machinery" of the approved agreement (which, incidentally was the WCAFBO agreement of the present case), or in any unauthorized "modification" or "extension" of the unapproved agreement by reason of such use, but simply in the making of an unapproved section 15 agreement which was beyond the scope of the approved WCAFBO agreement—i.e. "not one limited to MSTS cargo and related services"—and therefore, since it related to rates in the commerce of the United States, a violation of the Act.

The imoprtant thing is not the use, if any, of the AGAFBO or WCAFBO organization, or of the AGAFBO

or WCAFBO label; it is the nature and scope of an approved agreement in relation to the nature and scope of an unapproved agreement. If the unapproved agreement is not, of itself, required to be approved under section 15 —whether because it is not of the kind described therein or because its scope of operation is outside the jurisdiction of the Commission—and does not in fact change the approved agreement as approved by the Commission, then it does not matter that the administrative machinery may overlap, or even that the same name be used. It may be noted that the "organization" name of AGAFBO does not appear in the approved MSTS agreement No. 8086 except in article 4 thereof, relating to penalties for violations, where it is provided that the amounts collected thereunder "shall be placed in the treasury of the Atlantic and Gulf American-Flag Berth Operators." The WCAFBO label does not appear at all in the body of the WCAFBO agreement (No. 8186), although it is headed "Agreement of West Coast American-Flag Berth Operators", and is so described in amendments 8186-1, 8186-2 and 8186-3, where the words "West Coast American-Flag Berth Operators" also follow the list of signatories. The agreements themselves did not, therefore, purport to limit the activities to be carried out under the WCAFBO and AGAFBO labels, although they did not, of course, extend Commission approval to any activities beyond those specifically covered by the agreements. Further, the basic functions of AGAFBO, WCAFBO and AFBO were, in the main, kept separate, despite frequent instances of more or less superficial confusion. But the undeniable confusion that existed from time to time between, and within, the associations or organizations administering the three agreements cannot obliterate the essential fact that the approved agreements and the unapproved agreements were in no way interdependent, did not modify one another, and were concerned with different subjects and with different spheres of activity, one within and one without the Commission's jurisdiction.

This situation bears no resemblance to that in *Trans-Pacific Freight Conf. v. FMC*, 314 F. 2d 928, where there was a single agreement, approved by the Commission, relating uniformly to the trade to ports in the United States and Canada from certain Far East ports. The Commission was found to have jurisdiction of a violation of the agreement which although the events leading up to it were "triggered" by a transaction in the Canadian trade, really went to the substance of the entire "unitary" agreement applicable to the commerce of the United States in the same way that it was applicable to foreign commerce.

Since the Rate Agreement and related AFBO agreements were not filed and were not required to be filed, as "modifications" of filed agreements or otherwise, and the complained of activities were not pursuant to or "under" agreements filed or required to be filed, it is not necessary to consider complainant's contention that where there is a filed agreement the Commission's jurisdiction extends to "all aspects" of such agreements, including foreign-to-foreign activities. However, the cases cited for this proposition emphasize the irrelevancy of the argument. *Trans-Pacific Freight Conference* has been discussed above. *Oranje Line v. Anchor Line Ltd.*, 5 F.M.B. 714, holds that where a single agreement embraces the foreign commerce of the United States and the foreign commerce of other nations, the Commission is not thereby precluded from approving the agreement in the absence of findings that it is unjustly discriminatory or unfair, or detrimental to the commerce of the United States, noting that there is "nothing in the Act, nor in our actions thereunder with respect to any particular agreement, which in any way purports to regulate the foreign commerce of other nations." *Sigfried Olsen v. W.S.A.*, 3 F.M.B. 254, was concerned with demurrage charges at Panama which were part of a tariff covering shipments from the United States—" * * * a demurrage regulation imposed upon the shipper as a condition to shipment at an American port"

(259). As for the recent decision in Docket No. 873, *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, served February 19, 1964, complainant overlooks a key sentence in the Commission's discussion of its jurisdiction over the level of travel agents' commissions set pursuant to conference agreements: "What we are here concerned with is concerted activity which is permissible solely by virtue of an agreement approved under section 15". That is one of many ways in which the present proceeding differs: the Rate Agreement, and all the "related agreements" and joint activity of which PSI complains, were not permissible solely or in any degree by virtue of the approved AGAFBO and WCAFBO agreements; they were permissible because they did not require approval under section 15, being outside the Commission's jurisdiction. They could not be brought within its jurisdiction by the existence of approved agreements relating to a different subject matter.

Findings and conclusions proposed by the parties have been incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record in this proceeding it is concluded and found that:

1. Respondents have not been shown to have modified Commission Agreements No. 8086, No. 8186 or No. 8750 except for such modifications as have been approved by the Commission.
2. Complainant has not been injured by or as a result of the said Agreements No. 8086, No. 8186 or No. 8750 or any modification thereof.
3. Complainant is not entitled to reparation by reason of any act of respondents or any of them in violation of the Shipping Act, 1916, as amended.

4. Insofar as any of the respondents engaged in any activity of the kind forbidden or declared to be unlawful by the Shipping Act, 1916, as amended, the said activity related solely to foreign international trade and was therefore not within the jurisdiction of the Commission or in violation of said Act.

An order dismissing the complaint will be entered.

WALTER T. SOUTHWORTH
Walter T. Southworth
Presiding Examiner

Washington, D. C.
May 6, 1964

EXHIBIT C

FEDERAL MARITIME COMMISSION

No. 1104

PACIFIC SEAFARERS, INC.

v.

ATLANTIC & GULF AMERICAN-FLAG BERTH OPERATORS, ET AL.

Agreements concerning rates and other matters described in section 15 of the Shipping Act, 1916, as amended, not within jurisdiction of the Commission where they relate solely to foreign interport trade in goods of foreign origin and destination, even though Agency for International Development financed the procurement and shipment of the goods and only American-flag carriers were involved.

Unfiled agreements outside territorial jurisdiction under Shipping Act, 1916, are not brought within jurisdiction by use of same organizations set up to administer other agreements filed with and approved by the Commission, where the approved agreements dealt with different subject matter and were not modified by the unfiled agreements.

Marvin J. Coles, Stanley O. Sher, and Armin U. Kuder for complainant, Pacific Seafarers, Inc.

Elmer C. Maddy and Ronald A. Capone for respondents Atlantic & Gulf American-Flag Berth Operators and its member lines, except American Export Lines, Inc., Isbrandtsen Company, Inc., Lykes Bros. Steamship Co., Inc., and Waterman Steamship Corporation.

Edward D. Ransom and Gordon L. Poole for respondents American-Flag Berth Operators and West Coast American-Flag Berth Operators and their member lines, except Isbrandtsen Company, Inc., Lykes Bros. Steamship Company, Inc. (not a member of WCAFBO) and Waterman Steamship Corporation.

Edward S. Bagley for respondent Lykes Bros. Steamship Company, Inc.

Sterling Stoudenmire for respondent Waterman Steamship Corporation.

Richard W. Kurrus and James Jacobi (Donald Caldera of counsel) for respondents American Export Lines, Inc. and Isbrandtsen Company, Inc.

Herbert B. Mutter and Robert J. Blackwell, Hearing Counsel.

Walter T. Southworth, Hearing Examiner.

REPORT

BY THE COMMISSION: (John Harlee, Chairman; James V. Day, Vice Chairman; George H. Hearn and John S. Patterson, Commissioners)

This is a complaint case before us on exceptions to the Initial Decision of the Examiner.

Complainant Pacific Seafarers, Inc. (PSI), alleges that respondents AGAFBO,¹ WCAFBO,² and AFBO,³ together with their member lines, have unlawfully attempted to drive PSI out of the Taiwan-Thailand/South Vietnam trade. Complainant asserts that respondents (1) have violated section 15 of the Shipping Act (the Act) by operating pursuant to an agreement not filed with or approved by the Commission, (2) have violated section 18 of the Act (a) by not filing their concertedly established rates with the Commission, and (b) by maintaining rates that are so unreasonably low as to be detrimental to our commerce, and (3) have violated section 16 First of the Act by acting in a manner which is unduly prejudicial to complainant.

PSI operates a common carrier service with American flag vessels in the Taiwan-Thailand/South Vietnam trade. It does not offer a service between the United States or any of its Districts or Territories or possessions on the one hand and a foreign country on the other hand. The principal commodity that it carries is cement and it was these cement offerings which prompted the institution of complainant's service. In addition to its common carrier

¹ Atlantic and Gulf Coast American Flag Berth Operators.

² West Coast American Flag Berth Operators.

³ American Flag Berth Operators.

service, a PSI affiliate operates a charter or tramp service in the same trade, again catering to cement principally. The cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port. The shipping arrangements as well as the sales of the commodities are made between foreign principals. Although the U.S. Government through the Agency for International Development (AID) ultimately finances the sales—including the cost of water transportation—our Government in no way participates in the transactions. Indeed, but for the cargo preference laws which require, generally, that fifty percent of AID-financed cargoes move in American flag bottoms, American flag vessel participation in the movement might never have occurred. Further, the record is bereft of any evidence that the cement involved was cement transshipped from the United States.

AGAFBO is a conference of American Flag carriers which operates under approved Agreement No. 8086, WCAFBO operates under Agreement No. 8186. Parties to each of these agreements are permitted to act collectively in the negotiation of transportation rates and conditions of carriage respecting MSTS* cargoes (including related shipments) to and from U.S. ports and between foreign ports. Agreement No. 8750, an approved inter-conference agreement, permits meetings and discussions between AGAFBO and WCAFBO. None of these agreements permits the signatories to agree upon rates for either commercial or other government-sponsored cargoes in our foreign commerce or in the foreign commerce of other nations. AFBO, an association of American flag carriers organized in the early 1950's, is composed of carriers who are members of either AGAFBO, WCAFBO, or both, although membership in neither AGAFBO, nor WCAFBO, is a prerequisite to AFBO membership. AFBO

* Military Sea Transportation Service.

purports to establish rates and conditions of carriage by its signatories between Taiwan/Japan and Thailand, Korea, Vietnam, the Phillipines, Okinawa and Cambodia. Its memoranda of agreed rates relate solely to commercial cargoes in these foreign interport trades. AFBO does not enjoy Commission approval under section 15 of the Act, nor are its tariffs filed with the Commission.⁵

Apart from the asserted violations of the Act, we are first confronted with the issue of jurisdiction. It is our judgment that the reach of the Act and, consequently our jurisdiction, does not extend to the matters complained of.

Admittedly, respondents entered into an agreement in the Taiwan-Thailand/South Vietnam trade and that agreement—AFBO—is the type which falls squarely within the purview of section 15. Parties to the AFBO agreement have not filed their agreement with the Commission, and have effectuated it without the Commission's prior approval. If our jurisdiction encompassed this trade, a classic violation of section 15 would be established, *harm vel non* to complainant notwithstanding.

While it is true that section 15 requires that:

“every common carrier by water . . . shall file . . . a copy . . . of every agreement with another such carrier.”

the “common carrier by water” of section 15 is the entity defined in section 1:

“The term ‘common carrier by water’ means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.”

⁵ PSI, likewise, has not filed with the Commission any schedule of rates in the Taiwan-Thailand/South Vietnam trade.

And a common carrier in foreign commerce is defined as:

" . . . a common carrier . . . engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade"

Hence, the reading of section 15 which Congress obviously intended requires that every common carrier by water in interstate commerce and every common carrier engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country file with the Commission for prior approval certain species of agreements with other such carriers.

The record in this case makes perfectly clear that the conduct complained of is and has been exercised by carriers in a trade or trades other than between "the United States or any of its Districts, Territories or possessions and a foreign country," and no matter how offensive or horrendous that conduct, it does not fall within the authority of this Commission. There is not a modicum of evidence that brings the gravamen of the complaint within the purview of the Act. Complainants have attempted to cross the jurisdiction barrier on two grounds.

First, we shall deal with the claim that since the cargoes, including the cost of transportation, were financed by AID what otherwise might have been commerce between two (or more) foreign nations was converted to the commerce of the United States. We have noted, in this regard, that the ocean transportation and the sales were arranged between foreign principals and that neither AID nor any other agency of our Government participated in any of the commercial or shipping transactions. AID's concern began and ended with its role as financier.⁶ The

⁶"A.I.D., itself, does not procure any commodities or make shipping arrangements. As a general rule, A.I.D. acts only in the capacity of a financing institution." Deposition of David E. Bell, AID Administrator, Exhibit 106.

lending of funds by a government agency to finance wholly foreign transactions, including ocean freight, does not convert foreign-to-foreign commerce into the foreign commerce of the United States, any more than would the lending of such money by an American private financial institution.

Our view in this regard is not unlike that generally held with respect to our antitrust laws:

" . . . (I)t is clear that the mere financing by Americans of manufacturing, mining, or other local activities abroad does not come within the Sherman Act." *Report of the Attorney General's National Committee to Study the Antitrust Laws (1955)*.

In short, our jurisdiction cannot be expanded or contracted merely by the underlying financial arrangements of ocean shipping.⁷

Finally, PSI argues alternatively that (a) AFBO itself, is an agreement within the purview of section 15 and should have been filed and approved before its effectuation, or (b) it is part and parcel of AGAFBO and/or WCAFBO which, as a modification thereof, should have been filed and approved prior to implementation.

As the record establishes, AFBO is an organization of American flag vessels plying a trade totally within the confines of foreign Far Eastern ports. For the simple reason that the trade does not involve as one terminus any port in a State, District, Territory or possession of the United States, the carriers, within the AFBO context cannot be deemed to be engaged in the foreign commerce of the United States.

⁷ A second argument advanced by PSI is not dissimilar from its AID claim. Briefly, its thrust is that the *mere operation* of U.S. flag vessels constitutes a "part of the commerce of the United States." No authority is found to support this assertion. We have noted that PSI's operation has been wholly foreign. We believe such operation constitutes "other local activities abroad." *Attorney General's National Committee, supra*.

Complainant's alternative argument, although equally defective, is more engaging. In support of its proposition it points to the use of AGAFBO and WCAFBO offices (and officers) for the transaction of some of AFBO's business and cites precedents which indicate that our jurisdiction often involves foreign-to-foreign commerce.

As the Examiner noted, the use of the "physical organization or 'machinery'" of the two approved agreements by the AFBO group is immaterial to whether or not AFBO constitutes an agreement within the purview of section 15.

There is no relationship between AFBO on the one hand and AGAFBO and WCAFBO on the other hand, save an overlapping of memberships and some confusing of the organizations administering the agreements. But it is crystal clear that AGAFBO and WCAFBO do not encompass the foreign-to-foreign movement of commercial cargoes, whether or not financed or owned by our Government. Were AGAFBO and WCAFBO to agree on rates and conditions of cargo moving on *our* foreign commerce not specifically authorized by the approved agreements, a different result might have been reached.

The cases cited by complainant fall far short of aiding its theories. In *States Marine Lines, Inc. v. Trans-Pacific Freight Conf.*, 7 FMC 204 (1962), the Commission considered the legality of an approved neutral body provision in the context of the filed and approved agreements. The particular transaction which triggered the proceeding, the movement of oranges from Japan to Canada, was entirely irrelevant. The real question in issue was whether conference was effectuating a neutral body provision compatible with the one which had been approved as a modification to its basic or organic agreement. Upon review, the court, in *Trans-Pacific Freight Conference of Japan v. FMC*, 314 F. 2d 277 (1963), addressed itself to the jurisdictional issue in foreign-to-foreign commerce and concluded that the neutral body's fines were assessed *not*

"for any act or thing done in connection with the shipments from Japan to Canada." The court significantly brushed aside the Conference's contention of no jurisdiction with the statement:

"... (W)e think that petitioners' assertion of lack of jurisdiction is without validity for a more fundamental reason. When the members of the conference chose to adopt their conference agreement and its various amendments, they deliberately elected to enter into a single unitary agreement 'to promote commerce from Japan, Korea and Okinawa to Hawaii and Pacific coast ports of the United States and Canada.' " (Emphasis ours.)

Further, *Oranje Line, et al. v. Anchor Line Limited*, 5 FMB 714 (1959), the Board noted that the trade between Canada and the United Kingdom was encompassed explicitly by the very terms of the agreement:

"It is clear that in this case, where the agreements cover both the foreign commerce of the United States and also the intimately related foreign commerce of Canada our jurisdiction exists."

In the case before us, the subject matter of the AFBO agreement is not set forth in the AGAFBO and WCAFBO agreements, nor is the subject matter "intimately related" to our foreign commerce.⁸

⁸ Complainant has placed some reliance on *United States v. Anchor Line, Ltd.*, 232 F. Supp. 379 (1964). Involved in that case were agreements made abroad which directly related to the foreign commerce of the United States:

"The vital principle to be applied in determining whether the United States courts have jurisdiction over foreign-flag carriers who fail to file contracts entered into abroad is whether the performance of those contracts or effectuation of those arrangements operated in this country so as to affect our foreign commerce directly and materially." (Emphasis added.)

In the case at hand the AFBO agreement neither directly nor materially affected our foreign commerce.

Since we have no jurisdiction in the premises, we shall not address ourselves to the other contentions raised by complainants. Accordingly,

IT IS ORDERED, That the complaint is hereby dismissed. By the Commission.

THOMAS LISI
Thomas Lisi
Secretary

(SEAL)

(Filed February 20, 1967)

**Answer of Defendant American Export Isbrandtsen Lines, Inc.
to Complaint for Damages Under the Antitrust Laws**

Defendant American Export Isbrandtsen Lines, Inc. (hereinafter referred to as AEIL), by its attorneys, states as and for its Answer to the Complaint in the above entitled action:

FIRST DEFENSE

The Complaint for treble damages fails to state a claim against AEIL upon which relief can be granted.

SECOND DEFENSE

1. AEIL admits that the action purports to be brought as stated in paragraph 1 of the complaint which alleges conclusions of law, but denies that the plaintiffs or any of them have a cause of action against AEIL under the statutes referred to therein and further denies that the Court has jurisdiction of the subject matter of the complaint.

2. AEIL admits paragraph 2 of the complaint insofar as it relates to it and is without sufficient knowledge or

information to form a belief as to the truth of the allegations as they relate to the other twenty-one corporate defendants.

3. AEIL is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraphs 3 through 7 of the complaint.

4. AEIL is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 8 through 29 of the complaint, except that as to paragraph 12 of the complaint it admits that it is a New York corporation whose previous name was American Export Lines, Inc. This defendant avers that its correct name is American Export Isbrandtsen Lines, Inc., without a hyphen, and further avers that Isbrandtsen Company, Inc. is still in existence.

5. AEIL admits the allegations contained in paragraphs 30 and 31 of the complaint, except that it refers to the approved agreements on file with the Federal Maritime Commission for an accurate and complete description of the terms of the agreements and it is without sufficient knowledge to form a belief as to the truth of the allegations that AGAFBO and WCAFBO transact business in the District of Columbia.

6. AEIL admits as alleged in paragraphs 32 and 33 of the complaint that it was a member of AGAFBO but avers that it was only an associate member of WCAFBO, and not becoming such until at least June 1, 1962 when it acquired a round-the-world service.

7. AEIL neither admits nor denies the allegations contained in paragraph 34 of the complaint inasmuch as they constitute conclusions of law, or are definitions, requiring neither admission nor denial.

8. AEIL admits the allegations contained in the first paragraph of paragraph 35 of the complaint, insofar as they relate to it, except that it denies the allegations con-

tained in the third, fourth, and fifth sentences of such paragraph. AEIL admits that it receives an operating-differential subsidy from the United States of America, avers that a construction-differential subsidy has been paid to domestic shipyards by the United States government in connection with some of its vessels and this defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in the second paragraph of paragraph 35 of the complaint as they may relate to other defendants.

9. AEIL is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 36 of the complaint.

10. AEIL denies the allegation of paragraph 37 of the complaint that since May, 1959, it has been a party to an agreement fixing Far East interport rates; denies the maintenance of agreed rates applicable to the Far East interport cargo during the period of time plaintiffs claim to have sustained injury, denies that it ever took part in establishing rates set forth in the memorandum of agreed rates, denies that it was obligated to or did at all times follow and adhere to the rates therein listed, and denies the third sentence of this paragraph of the complaint. This defendant admits that interport rate advices were not submitted to nor approved by the Federal Maritime Commission and avers that they were not submitted or approved because said Commission had no jurisdiction over any such unfiled agreement as was found by the Federal Maritime Commission in a Report served March 17, 1965, in Docket No. 1104, *Pacific Seafarers, Inc. v. Atlantic & Gulf American-Flag Berth Operators, et-al.*, 8 F.M.C. 461, 5 SRR 859, said lack of jurisdiction being based on findings by the Commission that the AFBO agreement neither directly nor materially affected United States foreign commerce in that it related solely to commercial cargoes in foreign interport trade.

11. AEIL is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 38 of the complaint, except that it avers that plaintiffs were engaged only in foreign-to-foreign interport trade in the Far East in cargoes of local origin and destination.

12. AEIL denies the allegations of paragraph 39 of the complaint.

13. AEIL denies the allegations contained in paragraphs 40 through 43 of the complaint insofar as they relate to it, admits that PSI was admitted to membership in AGAFBO and WCAFBO and is without sufficient knowledge or information to form a belief as to the truth of the allegations as they relate to any or all of the other defendants. This defendant avers that it has never been a party to any action, either individually or as a member of a group, designed in any way to have plaintiff PSI declared ineligible to participate in the movement of any cargoes or to force plaintiffs out of the Far East interport trade or any other trade. Any use of AEIL's name by other defendants in an effort to secure a requirement that AID shipments in the area were to be limited to conference liners was unauthorized, it did not take part in any opening of the cement and fertilizer rates, or engage in price-cutting, predatory or otherwise, and further avers that it would have no reason to make any efforts, concerted or otherwise, to drive plaintiffs PSI and Seafarers out of the Far East interport trade since the vessels of AEIL were in no way competitive with the now defunct operations of plaintiffs PSI and Seafarers, or either of them, in the service with which the complaint is concerned. This defendant's operations in the Far East interport trade have at all times been in an eastbound direction while plaintiffs' operations, in the trade in which they claim to have been excluded, were in the opposite direction.

14. AEIL neither admits nor denies the allegation contained in paragraph 44 of the complaint insomuch as it is a conclusion of law, requiring neither admission nor denial, and refers the Court to the Report of the Federal Maritime Commission in *Pacific Seafarers, Inc. v. Atlantic and Gulf American-Flag Berth Operators, et al.*, referred to in paragraph 10 above, and to the Initial Decision of the presiding examiner in said Docket No. 1104 dated May 6, 1964, reported at 3 SRR 979.

15. AEIL denies the allegations of paragraph 45 of the complaint insofar as they relate to it and is without sufficient knowledge or information to form a belief as to the truth of the allegations as they relate to any or all of the other defendants. This defendant avers that any business and property loss suffered by plaintiffs was not the direct or indirect consequence of any action of AEIL.

16. AEIL denies that its activities impinged in any way upon the alleged profitableness of plaintiffs PSI and Seafarers and is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in paragraph 46 of the complaint.

17. AEIL is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 47 of the complaint.

18. AEIL denies each and every allegation contained in paragraph 48 of the complaint insofar as they relate to it and is without sufficient knowledge or information to form a belief as to the truth of the allegations as they relate to any or all of the other defendants.

19. Except to the extent expressly admitted herein, AEIL denies the allegations of the complaint and puts plaintiffs to their proof.

THIRD DEFENSE

Since no cause of action is stated in the Complaint concerning plaintiffs Great Lakes Bengal Lines, Inc., Mid-American Steamship Corp. and J. J. Georgelis, Inc., these plaintiffs are without any standing to sue and the Complaint should be dismissed as to them for the failure to state a claim under the antitrust laws against defendants upon which relief can be granted.

FOURTH DEFENSE

AEIL never has been competitive with plaintiffs. The complaint concerns itself solely with the foreign interport trade in the carriage of cement, fertilizer and other cargoes of local origin from Taiwan and Thailand to South Vietnam. At no time has AEIL been engaged in that westward Far East interport transportation. At all times material herein, AEIL offered common carrier service in the Far East only on its eastbound route denominated as "Line F-Round-The-World (Eastbound) Service" in its Operating-Differential Subsidy Contract No. FMB-87 pursuant to which it transports cargoes eastward from Hong Kong to Taiwan and thence to Korea and Japan and homebound to the Pacific Coast of the United States. AEIL never handled cargoes in the opposite direction which plaintiffs PSI and Seafarers traveled. Defendant denies that it took or concurred in any action designed to harm plaintiffs or to monopolize Far East interport trade.

FIFTH DEFENSE

The Court lacks jurisdiction of the subject of the matters alleged in the complaint which are beyond the reach of the United States antitrust laws, since the trade or commerce involved was not the interstate or foreign commerce of the United States and had no effect upon such commerce, but instead was related solely to and affected only commerce wholly between foreign nations and, accordingly,

the complaint alleges no case under the acts of Congress cited.

SIXTH DEFENSE

If the foreign commerce of the United States was involved or affected by reason of the activities of defendants as alleged in the complaint, then plaintiffs are precluded from any recovery herein because the Federal Maritime Commission has exclusive or primary jurisdiction over the allegations of the complaint which raise questions under the Shipping Act, 1916, as amended, 46 U.S.C. §§ 801, *et seq.*, and the civil action should either be dismissed or all further proceedings stayed pending initial review and determination of the allegations by the Federal Maritime Commission.

SEVENTH DEFENSE

To the extent that any of the defendants may have approached jointly public officials in an effort to influence them for their personal advantage and to plaintiffs' disadvantage, as alleged in the complaint, any such concerted activities could not constitute a conspiracy giving rise to a treble damages suit either standing alone or as part of a broader program.

EIGHTH DEFENSE

Assuming arguendo a violation of the antitrust laws, the plaintiffs may not recover; for having openly participated in and expressly agreed to abide by all the terms and conditions of the rate agreement between defendants while it was in effect and having been members of AGAFBO and WCAFBO, they stand in *pari delicto* with defendants and the law leaves them where it finds them.

NINTH DEFENSE

The rights of action, if any, set forth in the complaint did not accrue within four years next before the commencement of this civil action and it is thus forever barred by the statute of limitations (15 U.S.C.A. § 15b, 69 Stat. 283).

WHEREFORE, defendant American Export Isbrandtsen Lines, Inc., having fully answered, demands judgment dismissing the Complaint for Damages Under the Antitrust Laws against it, together with its costs and disbursements in this action, and such other and further relief as this Honorable Court may deem just and proper.

KURRUS AND JACOBI
2000 K Street, N. W.
Washington, D. C. 20005

/s/

Richard W. Kurrus

/s/

James N. Jacobi
Attorneys for Defendant
American Export Isbrandtsen Lines, Inc.

Dated: February 20, 1967

(Filed March 30, 1967)

Motion of Matson Navigation Company for Summary Judgment on the Complaint of All Plaintiffs and Alternative Motion for Dismissal of Complaints of Plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp., and J. J. Georgelis, Inc.

I.

Defendant Matson Navigation Company moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment in its favor as to the complaint of all plaintiffs on the ground that there is no genuine issue as to any material fact and that, absent such issue, defendant is entitled to a judgment as a matter of law.

II.

As an alternative to its Motion for Summary Judgment, defendant Matson Navigation Company moves this Court, pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, to dismiss the complaints of plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp., and J. J. Georgelis, Inc., for failure to state a claim upon which relief can be granted.

ROBERT S. BURK
Robert S. Burk
TURNER, MAJOR, SHERFY, & SAGE
20001 Massachusetts Avenue, N. W.
Washington, D. C. 20036
*Attorney for Defendant Matson
Navigation Company*

NOTE: Exhibit 4 attached to the affidavit of Willis R. Deming, filed in support of above motion, is the same as Exhibit B attached to the Motion to Dismiss filed by Defendants Pacific Far East Line, Inc., and Exhibit 5 attached to the Deming affidavit is the same as Exhibit C attached to the Pacific Far East motion. Both exhibits are printed herein following the Pacific Far East motion.

**Statement of Material Facts Pursuant to District
Court Rule 9(h)**

Defendant Matson Navigation Company contends that there is no genuine issue as to the following material facts:

1. The trade or commerce covered by this complaint is the Far East interport trade, consisting of the transportation of cargoes from ports in the countries of Taiwan and Thailand to ports in the country of South Vietnam.
2. Plaintiffs Pacific Seafarers, Inc., (PSI) and Seafarers, Inc., operated in the above-described Far East interport trade.
3. The cargoes carried by PSI and Seafarers in that trade, basically cement and fertilizer, were commercial in nature, were originated in one foreign port and were destined to another, and the shipping arrangements and sale of the commodities were made between foreign principals.
4. Defendant Matson Navigation Company (Matson) has not been a competitor in the Far East interport trade and the president of PSI has admitted that fact in a prior proceeding before the Federal Maritime Commission.
5. Matson has never been a party to, or associated with, the "AFBO" rate-fixing agreement.
6. Matson has never been a full member of either "AGAFBO" or "WCAFBO". It has only been an associate member of those agreements and, as such, its participation was limited to areas and matters not involved in this complaint.
7. Matson's relationship to the subject matter of this complaint was previously at issue before the Federal Maritime Commission and, in that proceeding, PSI admitted that it had no individual grievance against Matson and the Initial Report of the Commission found as a fact

that Matson had no part in the activities here complained of and had no knowledge of them. Those findings of lack of participation and knowledge are factually correct.

ROBERT S. BURK
Robert S. Burk
TURNER, MAJOR, SHERFY & SAGE
2001 Massachusetts Avenue, N.W.
Washington, D. C. 20036
Attorney for Defendant
Matson Navigation Company

**Motion of Defendant Moore and McCormack Co., Inc.
for Summary Judgment**

Defendant Moore and McCormack Co., Inc. ("Mormac") moves this Court to enter Summary Judgment in its favor, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the action in its entirety on the ground that there is no genuine issue as to any material fact and that Mormac is entitled to judgment as a matter of law.

This motion is based upon the following documents attached hereto:

1. Statement of Material Facts.
2. Points and Authorities Relied Upon.
3. Memorandum of Points and Authorities.
4. Affidavit of Richard L. Hansen.
5. Affidavit of M. Joseph Kelly and incorporated exhibit.
6. Affidavit of John F. Sand.

This motion is also based upon the following documents previously filed as Exhibits A, B and C respectively to the Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaint in its Entirety filed by Pacific Far East Line, et al.:

7. Complaint in *Pacific Seafarers, Inc. v. Atlantic and Gulf American Flag Berth Operators, et al.*, FMC Docket No. 1104.

8. Decision of the Examiner in *Pacific Seafarers, Inc. v. Atlantic and Gulf American Flag Berth Operators, et al.*, FMC Docket No. 1104.

9. Decision of the Federal Maritime Commission in *Pacific Seafarers, Inc. v. Atlantic and Gulf American Flag Berth Operators, et al.*, FMC Docket No. 104.

Respectfully submitted,

KOMINERS & FORT

By J. FRANKLIN FORT

J. Franklin Fort

529 Tower Building

Washington, D. C. 20005

Attorneys for Defendant

Moore and McCormack Co., Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3088-66

PACIFIC SEAFARERS, INC., ET AL., *Plaintiffs*

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Defendants*

Affidavit of Richard L. Hansen

STATE OF NEW YORK } ss:
COUNTY OF NEW YORK }

RICHARD L. HANSEN, being first duly sworn, deposes and says:

1. I am the Secretary of the Atlantic & Gulf American-Flag Berth Operators ("AGAFBO") and have occupied that position since January 1, 1959.

2. AGAFBO is an unincorporated organization of American-Flag common carriers by water which transport cargo for the Military Sea Transportation Service (MS-TS) and related military shipper services. AGAFBO is organized under and operates pursuant to F.M.C. Agreement No. S086 as amended, an agreement filed with and approved by the Federal Maritime Commission.

3. I was a witness in *Pacific Seafarers, Inc. v. Atlantic & Gulf American Flag Berth Operators, et al.*, F.M.C. Docket No. 1104, and was cross-examined by counsel for plaintiff Pacific Seafarers, Inc. ("PSI") in that proceeding.

4. In that proceeding I testified to the same matters as those contained in this affidavit.

5. Beginning in January 1, 1959, when I became Secretary of AGAFBO and continuing until March 28, 1963, I have transmitted AFBO communications to those East Coast members of AGAFBO who were also members of AFBO.

6. AFBO is an informal group of American-flag lines which participated in the carriage of cargo in the Far East interport trade. It is wholly separate and distinct from AGAFBO. Moore-McCormack Lines, Incorporated, and the predecessor ship operating company, Moore-McCormack Lines, Inc. (hereinafter together with Moore and McCormack Co., Inc., referred to collectively as "Mor-mac"), were members of AGAFBO until March 6, 1967, but have never been members of AFBO.

7. The service of transmitting AFBO communications through AGAFBO originated prior to my becoming Secretary of AGAFBO and was done as a convenience to AFBO and its East Coast member lines in the Far East trade. In January 1959, the east Coast shipping lines to which I sent AFBO communications were Isbrandtsen Lines, Lykes Bros. Steamship Co., Inc., and United States Lines Co.

8. For the purpose of informing AGAFBO members of developments in the shipping trade with which they are concerned, I maintain separate mailing lists for particular geographic areas.

9. Communications from AFBO which were transmitted through AGAFBO, were sent only to those shipping lines on the AGAFBO Far East mailing list.

10. Mormac is not now and has never been on AGAFBO's Far East mailing list, and has never received through AGAFBO any communications relating to AFBO matters or the Far East interport trade.

11. Neither AFBO matters nor the Far East interport trade was ever discussed at any AGAFBO meeting, nor did Mormac ever vote on, consult about, or give its advice on any matter relating to the Far East interport trade or AFBO matters at AGAFBO meetings.

12. My only knowledge of AFBO matters comes from the communications which I received from AFBO and transmitted to the Far East lines through the AGAFBO office.

13. When on November 15, 1962, PSI became a member of AGAFBO and expressed its interest in the Far East interport trade, I placed PSI on the AGAFBO Far East mailing list and thereafter until March 28, 1963, PSI received all AFBO communications transmitted through AGAFBO, in the same manner as every other shipping line on AGAFBO's Far East mailing list.

14. On March 28, 1963, due to the increasing work load of purely AGAFBO matters, I terminated my policy of transmitting AFBO communications through AGAFBO.

15. The expenses AGAFBO incurred in handling and transmitting AFBO communications were inconsequential.

Further deponent saith not.

RICHARD L. HANSEN
Richard L. Hansen

Subscribed and sworn to before me this 13th day of April, 1967.

WALTER J. DONOVAN
Notary Public
State of New York No. 41-
0995985 Qualified in Queens
Co.

My Commission Expires: March 30, 1969

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3088-66

PACIFIC SEAFARERS, INC., ET AL., *Plaintiffs*

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Defendants*

Affidavit of M. Joseph Kelly

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

M. JOSEPH KELLY being duly sworn, deposes and says:

1. I am an Assistant Vice President of Moore-McCormack Lines, Incorporated, and am familiar with the facts relating to the above-entitled antitrust suit. Moore-McCormack Lines, Incorporated, was incorporated on November 10, 1964 and organized on March 1, 1965, and took over the ship operating activities of Moore-McCormack Lines, Inc. The name of the latter was then changed to Moore and McCormack Co., Inc. I am authorized to make this affidavit on behalf of these companies (hereinafter collec-

tively referred to as "Mormac") in connection with this suit.

2. I am familiar with the business activities of Mormac and with its activities and relationship with respect to the Atlantic and Gulf American-Flag Berth Operators ("AGAFBO").

3. Mormac has at no time material to the complaint herein been engaged in or in any way interested in the Far East interport trade, nor have any activities of Mormac had any effect upon the Far East interport trade.

4. Mormac is not and has never been a member of West Coast American Flag Berth Operators ("WCAFBO") or American Flag Berth Operators ("AFBO"), nor of any conference or agreement concerned with the Far East interport trade and publishes no rates and offers no service in that trade.

5. Since Mormac does not ship in, and is not connected or concerned with the Far East interport trade in any respect, Mormac does not have knowledge of, nor does it have reason to know of any of the activities of any other company in that trade.

6. From February 1965 through March 6, 1967, I was Mormac's representative on AGAFBO. Mormac resigned from AGAFBO effective on the latter date.

7. In that capacity and during that period, I have attended most of the AGAFBO meetings and have received all communications which AGAFBO has sent to Mormac.

8. None of the communications which I have received from AGAFBO relate in any manner to AFBO, the Far East interport trade, or the activities of AFBO or WCAFBO in relation to any of the plaintiffs or their officers.

9. I am familiar with the Federal Maritime Commission proceeding styled Docket No. 1104, *Pacific Seafarers, Inc. v. Atlantic & Gulf American-Flag Berth Operators, et al.*

10. I have read the certified correct copies of portions of the transcript of the pre-hearing conference and evidentiary hearing, the Initial Decision of Walter T. Southworth, Examiner, and the Report by the Commission, all of which are attached as Exhibits 3, 4 and 5 to the Affidavit of Willis R. Deming accompanying the motions previously filed by Matson Navigation Company.

11. In Federal Maritime Commission Docket No. 1104, complainant Pacific Seafarers, Inc., one of the plaintiffs herein, through its counsel, and its owner, J. J. Georgelis, admitted that it had no individual or specific grievance against Mormac; that Mormac was not a competitor of plaintiff; and that Mormac was named a respondent in the Federal Maritime Commission proceeding only because complainant believed the Commission's rules required that Mormac be so named.

12. That, subsequently, in the Initial Decision of Walter T. Southworth, Examiner, the facts were found to be that Mormac had no part in any of the acts complained of, nor knowledge of such activities, that concededly Mormac was not in competition with complainant, and that there was no evidence whatever that Mormac was a party to any agreement or understanding of a conspiratorial nature.

13. That the Initial Decision in Federal Maritime Commission Docket No. 1104 accurately reflects the complete lack of participation or involvement by Mormac in any of the alleged activities or events described in the complaint in this action.

Further deponent saith not.

M. JOSEPH KELLY
M. Joseph Kelly

Subscribed and sworn to before me this 14th day of April, 1967.

WALTER J. DONOVAN

Notary Public

State of New York No. 41-
0995985 Qualified in Queens
Co.

My Commission Expires: March 30, 1969

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3088-66

PACIFIC SEAFARERS, INC., ET AL., *Plaintiffs*

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Defendants*

Affidavit of John F. Sand

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

JOHN F. SAND, being duly sworn, deposes and says:

1. I was Traffic Manager of Moore-McCormack Lines, Inc. during the period from March 30, 1954 until December 31, 1963, when I retired. Subsequent to my retirement, Moore-McCormack Lines, Incorporated, was incorporated on November 10, 1964 and organized on March 1, 1965, and took over the ship operating activities of Moore-McCormack Lines, Inc. The name of the latter was then changed to Moore and McCormack Co., Inc. I am authorized to make this affidavit on behalf of these companies in connection with this suit.

2. I was familiar with the activities and relationship with respect to the Atlantic and Gulf American-Flag Berth Operators ("AGAFBO") during the period from

May 15, 1956 when AGAFBO was formed until the date of my retirement.

3. Moore-McCormack Lines, Inc. was at no time during the period of my employment with the company engaged in or in any way interested in the Far East interport trade, nor did any activities of Moore-McCormack Lines, Inc. have any effect upon the Far East interport trade.

4. Moore-McCormack Lines, Inc. was not a member of West Coast American-Flag Berth Operators ("WCA-FBO") or American Flag Berth Operators ("AFBO"), nor of any conference or agreement concerned with the Far East interport trade and publishes no rates and offers no services in that trade.

5. Since Moore-McCormack Lines, Inc. did not ship in, and was not connected or concerned with the Far East interport trade in any respect, Moore-McCormack Lines, Inc. did not during the periods mentioned have knowledge of, nor did it have reason to know of any of the activities of any other company in that trade.

6. Moore-McCormack Lines, Inc. during the period of my employment with the company was never aware of, and never authorized or participated in acts of AFBO or AGAFBO, if any, designed to eliminate plaintiffs from, or in any way restrain, the Far East interport trade.

7. From May 1956 until December 1963, I was Moore-McCormack Lines, Inc.'s representative on AGAFBO.

8. In that capacity and during that period, I attended most of the AGAFBO meetings and received all communications which AGAFBO sent to Moore-McCormack Lines, Inc.

9. At none of those meetings was AFBO, the Far East interport trade, or any of the plaintiffs or their officers discussed.

10. None of the communications which I received from AGAFBO related in any manner to AFBO, the Far East interport trade, or the activities of AFBO or WCAFBO in relation to any of the plaintiffs or their officers.

Further deponent saith not.

JOHN F. SAND
John F. Sand

Subscribed and sworn to before me this 13th day of April, 1967.

WALTER J. DONOVAN

Notary Public

State of New York No. 41-
0995985 Qualified in Queens
Co.

My Commission Expires: March 30, 1969

(Filed April 14, 1967)

Statement of Material Facts

Defendant Moore and McCormack Co., Inc. contends that there is no genuine issue as to the following material facts:

1. The acts complained of in this action formed the basis of the complaint by Pacific Seafarers, Inc. ("PSI") in *Pacific Seafarers, Inc. v. Atlantic & Gulf American-Flag Berth Operators, et al.*, FMC Docket No. 1104.
2. In denying PSI's Shipping Act claims in Docket No. 1104, the Examiner and Federal Maritime Commission were acting in a judicial capacity.
3. In Docket No. 1104, the factual disputes resolved were relevant to the issues properly before the Federal Maritime Commission, and PSI had a full and fair opportunity to argue its version of the facts and had an opportunity to seek court review of any adverse findings.

4. Plaintiffs Seafarers, Inc., Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp., and J. J. Georgelis, Inc., are in privity with plaintiff PSI.

5. Mormac is not and has never been (a) a member of AFBO, (b) a competitor of any of the plaintiffs, (c) interested in or concerned with the Far East interport trade which is the trade complained of herein, (d) on AGAFBO's mailing list for communications concerning or affecting the Far East interport trade, (e) a recipient of any communications from AGAFBO relating to the Far East interport trade, (f) aware of any acts of AGAFBO designed to eliminate plaintiffs from the Far East interport trade.

Respectfully submitted,

KOMINERS & FORT

By J. FRANKLIN FORT
J. Franklin Fort
529 Tower Building
Washington, D. C. 20005
Attorneys for Defendant
Moore and McCormack Co.,
Inc.

(Filed April 21, 1967)

EXHIBIT 1 [TO APPELLANTS' MEMORANDUM IN
OPPOSITION IN THE COURT BELOW]

FEDERAL MARITIME COMMISSION

Docket No. 1104

In the Matter of:

PACIFIC SEAFARERS, INC., Complainant,

v.

ATLANTIC AND GULF AMERICAN-FLAG BERTH OPERATORS,
ET AL., Respondents.

Excerpts From Testimony of Andrew Rockefeller, Traffic Manager for Pacific Coast Far East Services of States Marine Lines

Q. Could you describe the frequency of the States Marine Service between Formosa, Saigon and Bangkok over the past year?

A. For the year 1963? (Tr. 282)

Q. Let us say the latter part of 1962 and November, October, December of 1962 to the present date in 1963.

A. I would guess we probably averaged three ships a month, three to four ships a month into Saigon.

Q. From where?

A. They may come from anywhere.

Q. Well, could you be a little more specific where they did come from?

A. Well, they would come from any one of your services from the United States proceeding via probable Japan, Korea, Okinawa, Formosa, down to Saigon.

Q. They all come from the United States?

A. I would say most of them would.

Q. From the East Coast Gulf or West Coast?

A. That is correct.

Q. Pardon?

A. That is correct.

Q. From all three?

A. All three coasts. It is part of our regular outbound service.

Q. What is your regular outbound service?

A. We average approximately ten to eleven sailings from the West Coast to what you call the Far East area, per month. (Tr. 283)

Q. It is correct when these vessels reach the Far East they may discharge cargo at a Far East port and pick up cargo and then they may move on to the next port and discharge and pick up?

In other words, the vessels moving from, let us assume, the West Coast to the Far East, is not just discharging cargo that picks up Far East interport cargo on the run?

A. Sometimes; sometimes not. Usually, if you call a port you are either calling a load or discharge.

In each trip there is a particular entity into itself.

Q. I understand that.

But you do pick up cargo at Far East interports and drop it off at other Far East interports as part of a service that moves from the United States?

A. That is correct.

Q. Do you have any vessels that don't move from the United States ports and just operate in the Far East interport trade? What I mean by Far East interport trade, I refer you to Exhibit 2, which is the AFBO memorandum of agreed rates, and I will show you a copy but I suspect you are familiar with it.

A. Yes. (Tr. 284)

The Witness: We do have ships that may make one or more voyages in the interport area.

However, no ships are out there exclusively on interport business.

By Mr. Sher:

Q. You have no ships either owned or time-chartered that are out there exclusively on Far East interport business, do you?

A. That is correct. (Tr. 285)

Q. The question is: Of your Far East interport cargo, what percentage is financed by capital A, capital I, capital D?

A. I would say a large percentage. We also carry a lot—

Q. Well, just a minute.

Examiner Southworth: Let him finish the answer.

Mr. Sher: I don't think I got the answer.

The Witness: I said a large percentage.

We also carry a lot of Import-Export Bank-financed material, military assistance program material, World Bank-financed material.

Now, you can categorize all this as aid to these underdeveloped countries.

Examiner Southworth: No. He was just talking about the capital A.I.D.

What is the name of that? Does anybody here know?

Mr. Maddy: Agencies for International Development, isn't it?

The Witness: I said, a large percentage.

I mean by "a large percentage," probably eighty per cent, I mean, if you want a rough guess off the top of my head.

Examiner Southworth: Does this eighty per cent include the Import-Export Bank and—

The Witness: No. This is eighty per cent so-called capital A, capital I, capital D.

By Mr. Sher:

Q. And the remaining twenty per cent is comprised of the other agencies you just mentioned?

A. And commercial cargo.

Q. Of the remaining twenty per cent, what percentage is commercial cargo and what is cargo financed by the other agencies you just mentioned?

A. I would say—it's very hard when you—to differentiate.

I mean, all this cargo is commercial cargo to us. We don't care how it's financed. We don't care who pays the freight. (Tr. 325, 326, 327)

Q. Back to my question, if you can possibly answer it. Of the remaining twenty per cent which moves under the AFBO agreement which is not A.I.D., you said the remainder was financed by certain government agencies and also comprised commercial cargo.

Of the remaining—

A. I would say probably fifteen per cent is other government agencies.

Q. The United States Government agencies pay the freight?

A. Well, if you call the World Bank—it's not a U. S. agency. It's a world financial body.

Import-Export Bank is also a joint venture. (Tr. 327, 328)

Q. Does the cement you are carrying in the Far East at the present time in any way determine your voyage itineraries leaving—vessels leaving United States ports?

A. We always look at everything when we assign a vessel. There's no—you cannot separate any segment. It's

Q. In other words, it is one of the factors determining a sailing schedule of your vessels that leave the United States ports?

A. States Marine has been in the interport business for many years, and it's an enormous part of our business.

Q. I understand.

But could you just answer the question as to whether it plays a part in scheduling your vessels that leave from United States ports?

A. Well, I would have to explain. The interport is a very important part of our world-wide services. Therefore, it obviously plays a very large part in the scheduling of our ships. (Tr. 340, 341)

(Filed April 21, 1967)

EXHIBIT 2 [TO APPELLANTS' MEMORANDUM IN
OPPOSITION IN THE COURT BELOW]

Affidavit

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

DAVID E. BELL, being duly sworn, deposes and says:

1. I am Administrator of the Agency for International Development ("A.I.D."), successor to the International Cooperation Administration ("ICA") and the Development Loan Fund ("DLF"). By State Department Delegation of Authority No. 104 dated November 3, 1961, the Secretary of State delegated to me the functions vested in the Secretary of State by Executive Order 10973 and Executive Order 10900 for the administration of certain provisions of the Foreign Assistance Act of 1961, as amended, the Mutual Security Act of 1954, as amended, and title II of the Agricultural Trade Development and Assistance Act of 1954, as amended (P.L. 480). This affidavit is based on information available to me in my official capacity.
2. Pursuant to the Foreign Assistance Act of 1961, as amended, A.I.D. finances shipments between Taiwan, Thailand, and South Vietnam. The funds used to finance such shipments are made available pursuant to A.I.D. loan and grant agreements. A.I.D., itself, does not procure any commodities or make shipping arrangements. As a general rule, A.I.D. acts only in the capacity of a financing institution. The procurement and shipment of commodities financed by A.I.D. in the trade between the aforementioned countries is subject to A.I.D. procurement policies.
3. A.I.D. financing of shipments between the aforementioned countries is, as a general rule, implemented pursuant to the following procedures: The recipient government suballocates the dollars made available under A.I.D. loan and grant agreements to commercial importers.

The importers pay to their government, in local currency, the equivalent of the A.I.D. dollars furnished by A.I.D. which have been suballocated to such importers. The importers procure from suppliers located abroad pursuant to normal commercial practices.

4. The basic commodities in the trade between the aforementioned countries which have been procured with A.I.D. financing in the manner described in paragraph 3 above are as follows: cement, fertilizers and general cargo. Almost all of the dry cargo tonnage consists of cement.

5. In Fiscal Year 1963 A.I.D.-financed dry cargo liftings between the aforementioned countries is estimated to be 100,000 tons in tramps and 335,000 tons in liners. All of this tonnage moved between Thailand and South Vietnam or Taiwan and South Vietnam. Our records do not indicate that any A.I.D.-financed dry cargo moved between Taiwan and Thailand during this period.

6. During Fiscal Year 1963 A.I.D. financed the purchase of cement for South Vietnam from Taiwan and Thailand to the following extent: (1) from Taiwan—\$6,700,000, (2) from Thailand \$1,962,000.

7. Cargo movements financed by A.I.D. are made subject to the requirements of § 901 (b) of the Merchant Marine Act of 1936, as amended. In the case of shipments to South Vietnam from Thailand and Taiwan, A.I.D. dollars made available for commodity procurement were made available subject to A.I.D. Regulation 1, § 201.6 (N). This paragraph of Regulation 1 implements the requirements of § 901 (b) of the aforementioned Merchant Marine Act by requiring that at least 50 per cent of the gross tonnage of all A.I.D.-financed commodities transported to the recipient country on ocean vessels during each fiscal year, as well as each quarterly period thereof, be transported on privately-owned U.S.-flag commercial vessels, to the extent that they are available at fair and reasonable rates for such vessels.

8. It is the policy of A.I.D. to finance only cargo transported on privately-owned U.S.-flag commercial vessels.

9. The Government of South Vietnam is in compliance with the requirements set forth in paragraph 201.6 (N) of A.I.D. Regulation 1. In fact, considerably more than 50 per cent of all A.I.D.-financed commodities transported to South Vietnam moved in privately-owned U.S.-flag commercial vessels. The Government of South Vietnam directs its importers to use privately-owned U.S.-flag commercial vessels to the full extent that they are available. This is apparently done in order to maximize the use of A.I.D. funds for the payment of ocean freight.

10. With respect to issues as to the reasonableness of rates A.I.D. looks to the Maritime Administration and the Federal Maritime Commission for guidance.

DAVID E. BELL
David E. Bell

Subscribed and sworn to before me this 3rd day of January 1964.

Mary Louise Ferguson

My Commission expires

(Filed April 21, 1967)

**EXHIBIT 3 [TO APPELLANTS' MEMORANDUM IN
OPPOSITION IN THE COURT BELOW]**

Excerpts from oral argument before the Commission on September 2, 1964 by Gordon L. Poole of Lillick, Geary, Wheat, Adams and Charles, San Francisco, California, on behalf of American-Flag Berth Operators (AFBO) and West Coast American-Flag Berth Operators (WCAFBO)

Mr. Poole: Now faced with this line of authorities, I believe that the complainant has adopted and improvised some new but quite unsound theories of jurisdiction of the Shipping Act. One of the theories runs, and it was referred to at the end of the discussion, but if it can be shown that respondents' activities in the foreign-to-foreign

trades have some effect, however remote, on the foreign commerce of the United States, then this Commission should take jurisdiction.

This, of course, is borrowed from the antitrust laws and not from the Shipping Act. (Tr. 44)

* * * * *

Commissioner Hearn: Now, do you contend that, furthering Mr. Patterson's question, do carrier members of AFBO, purely by reason of the foreign inter-port carriage, can act with impunity so far as this Commission is concerned, dealing with MSTS and AID cargo, even to the detriment of the United States-flag carrier?

Mr. Poole: So far as the Shipping Act is concerned, yes. I think they take their chances under the antitrust laws.

Commissioner Hearn: Well, in that case, you draw the distinction between foreign commerce of the United States and section 15 here?

Mr. Poole: Yes.

Well, section 15 I think can only be read in reference to section 1 of the Act where it defines those carriers which are subject to the regulation of the Shipping Act. There section 1 makes it pretty clear that it is only those carriers which are in the foreign trade from or to ports in the United States or districts, territories, and possessions of the United States are those carriers in the foreign commerce which are regulated by the Shipping Act.

What I am saying is it has been held, and I think it is true, that the jurisdiction under the Shipping Act is more restrictive than the jurisdiction under the antitrust laws. That is why I objected to antitrust principles being dragged in by the heels, so to speak, to define the jurisdiction of the Commission under the Shipping Act. (Tr. 66-67)

* * * * *

Chairman Harllee: Let me ask you, as I understand it, your position would be that for the second paragraph in the Shipping Act of 1916, that says the term "common

"carrier by water in foreign commerce" means a common carrier except ferryboats running in regular routes engaged in transportation by water, or passengers or property between the United States, any of its districts, territories, or possessions, and a foreign country.

Do I understand that you believe that to mean that the foreign commerce under the Shipping Act has to be between the United States or in its districts, territories, and possessions and a foreign country?

Mr. Poole: Yes, sir.

Chairman Harllee: And therefore that it excludes trade between one foreign port and another foreign port?

Mr. Poole: That's right. That applies to the geographical limitation, so to speak, of the Act.

Chairman Harllee: Thank you.

Commissioner Patterson: Excuse me.

That is in the second paragraph of the Shipping Act?

Mr. Poole: Section 1, the part you just read from.

Chairman Harllee: Yes.

Excuse me, did you have a question?

Commissioner Patterson: But you tie exclusively to section 1 in response to the Admiral's question, is that correct?

Mr. Poole: Yes, sir. Well, that isn't the sole authority, but I think basically that is where you look to determine the geographical limitation of scope of the Shipping Act.

Commissioner Hearn: How do you answer then, one answer you made to Mr. Kuder's point, that a United States-flag vessel in a foreign trade is within the foreign commerce of the United States?

Mr. Poole: Oh. That a foreign vesel—

Commissioner Hearn: That an American flag vessel in foreign trade, or inter-port trade, in or active in foreign commerce of the United States.

Mr. Poole: Well, the Shipping Act doesn't purport to regulate the foreign commerce of the United States, as does the antitrust laws. The Shipping Act I believe purports to regulate carriers, and it says which carriers are to be regulated by the Shipping Act.

I think the fact that an American-flag vessel might be regarded as engaged in commerce, the argument is, well, if you are in business—and certainly operating a vessel is a business—that's commerce. And then if you are an American-flag vessel, that is U.S. commerce.

I don't think the Shipping Act can be read in that fashion. I think you have to look to the carriers which are regulated under the Shipping Act. (Tr. 67-69)

(Filed April 25, 1967)

Motion of Defendant American Export Isbrandtsen Lines, Inc. (1) for summary judgement, and (2) to dismiss as to Plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corporation, and J. J. Georgelis for failure to state a claim upon which relief can be granted.

Defendant American Export Isbrandtsen Lines, Inc. (AEIL) moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure (FRCP) to enter Summary Judgment in its favor dismissing the entire action of all plaintiffs on the ground that there is no genuine issue as to any material fact and that AEIL is entitled to judgment as a matter of law. AEIL also moves this Court to dismiss the complaint of Great Lakes Bengal Lines, Inc. (Great Lakes Bengal), Mid-America Steamship Corp. (Mid America), and J. J. Georgelis, Inc. pursuant to Rule 12 (b) (6) of the FRCP for failure to state a claim upon which relief can be granted. Attached to this motion is movant's Statement of Material Fact and a Statement of Points and Authorities.

Respectfully submitted,

RICHARD W. KURRUS
JAMES N. JACOBI
Kurrus and Jacobi
2000 K Street, N.W.
Washington, D.C. 20006
Attorneys for Defendant
American Export Isbrandtsen
Lines, Inc.

April 25, 1967

(Filed April 25, 1967)

Statement of Material Fact Pursuant to Local Rule 9 (h)

Defendant American Export Isbrandtsen Lines, Inc. (AEIL) contends there is no genuine issue as to the following material fact upon which it is sufficient to resolve this action:

Plaintiffs' complaint is based solely upon the service of Pacific Seafarers, Inc. (PSI) and Seafarers, Inc. (Seafarers) in the Far East interport trade from Taiwan and Thailand to South Vietnam.

RICHARD W. KURRUS
JAMES N. JACOBI
Kurrus and Jacobi
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Washington, D.C.
Attorneys for Defendant
American Export Isbrandtsen
Lines, Inc.

April 25, 1967

(Filed May 10, 1967)

Motion of Defendant Grace Line Inc. (1) for Judgment in its favor as to all Plaintiffs, and (2) to Dismiss as to Plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corporation, and J. J. Georgelis, Inc.

Defendant Grace Line Inc. (Grace Line) moves this Court pursuant to Rule 12 and 56 of the Federal Rules of Civil Procedure to enter a judgment in its favor dismissing the entire action of all plaintiffs on the grounds that there is no genuine issue as to any material fact and that Grace Line is entitled to judgment as a matter of law. Grace Line also moves this Court to dismiss the complaint of Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp. and J. J. Georgelis, Inc. pursuant to Rule 12 of the Federal Rules of Civil Procedure on the

ground that they have failed to state a claim upon which relief can be granted. Attached to this motion are movant's Statement of Material Facts and a Statement of Points and Authorities.

Respectfully submitted,
DONALD J. MULVIHILL
CAHILL, GORDON, SONNETT,
REINDEL & OHL
Wire Building
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Washington, D.C. 20005
Attorneys for Defendant
Grace Line Inc.

(Filed May 10, 1967)

Statement of Material Facts Pursuant to Local Rule 9 (h)

Defendant Grace Line Inc. contends there is no genuine issue as to the following material facts.

1. Plaintiffs' complaint is based upon the service of Pacific Seafarers, Inc. and Seafarers, Inc. in the Far East interport trade from Taiwan and Thailand to South Vietnam beginning in the year 1962.
2. The cargoes carried by Pacific Seafarers, Inc. and Seafarers, Inc. in the Far East interport trade were basically cement and fertilizer, were commercial in nature, originated in one foreign port and were destined to another and the shipping arrangements and sale of the cargo were made between foreign principals.
3. From 1962 to date Grace Line Inc. has not provided service in the Far East and has not, as plaintiffs have conceded, been a competitor of any of the plaintiffs in the Far East interport trade from Taiwan and Thailand to South Vietnam.

4. Grace Line Inc. is named in the complaint by reason of its membership in the Atlantic & Gulf American-Flag Berth Operators from which Grace Line Inc. resigned in 1966.
5. Plaintiff Pacific Seafarers, Inc. was upon request admitted to membership in the Atlantic & Gulf American-Flag Berth Operators.
6. During its membership in Atlantic & Gulf America-Flag Berth Operators the participation of Grace Line Inc. was limited to areas and matters not involved in the complaint.
7. Grace Line had no part in and had no knowledge of the acts complained of in the complaint.
8. The subject matter of the complaint was previously before the Federal Maritime Commission. An Initial Decision was rendered by an Examiner and a Decision by the Commission both of which rejected complainants' claims. The legal effect of these decisions and their subsidiary findings is in dispute between the parties.

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Washington, D.C. 20005
Attorneys for Defendant,
Grace Line Inc.

(Filed May 10, 1967)

Stipulation of Defendants Re Presentation of Oral Argument

To facilitate the Court's disposition of numerous motions by various defendants now pending before the Court, and subject to the approval of the Court, it is agreed by and among the defendants in this cause that the fol-

lowing stipulations shall govern the oral presentation of defendants' various pending motions:

1. One designated defense counsel shall argue orally on behalf of *all* defendants, with respect to all pending defense motions, or portions of motions, which seek dismissal or summary judgment with respect to the entire complaint based on lack of jurisdiction over the subject matter. The motions, or portions of motions, covered by this paragraph include:

- (a) Farrell Lines, Inc. Motion to Dismiss For Failure to State a Claim, January 31, 1967 (not including the portion of this motion re plaintiffs' "standing");
- (b) Lykes Bros. Steamship Co., et al. Motion for Summary Judgment (not including "additional grounds" of certain defendants), February 7, 1967;
- (c) Pacific Far East Line, Inc. Motion to Dismiss the Complaint in its Entirety, February 20, 1967;
- (d) Waterman Steamship Corporation Motion to Dismiss, February 20, 1967, part 1;
- (e) American Union Transport, Inc. Motion for Summary Judgment, February 20, 1967 (not including "additional grounds" incorporated by reference from Lykes Bros., et al. motion *supra*);
- (f) Matson Navigation Company Motion for Summary Judgment, March 20, 1967, first ground;
- (g) Moore and McCormack Co. Motion for Summary Judgment, April 14, 1967, grounds 1, 2, and 5;
- (h) American Export-Isbrandtsen Lines, Inc. Motion for Summary Judgment, April 25, 1967;
- (i) Grace Line Inc. Motion Under Rules 12 and 56 for Judgment in Its Favor as to all Plaintiffs, to be filed no later than May 10, 1967 (not including "additional grounds" incorporated by reference from Lykes Bros. et al. motion *supra*).

2. Defendants shall take no more than one hour for defense argument, including rebuttal, if any, on the foregoing motions, or portions of motions listed in paragraph 1.

3. One designated defense counsel shall argue orally, on behalf of all defendants, with respect to all pending defense motions, or portions of motions, raising the question of "standing to sue" with respect to plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp., and J. J. Georgelis, Inc. The motions, or portions of motions, covered by this paragraph include:

(a) Farrell Lines, Inc. Motion to Dismiss for Failure to State a Claim, January 31, 1967, part 2;

(b) Lykes Bros. Steamship Co., et al. Motion to Dismiss for Failure to State a Claim, February 7, 1967;

(c) Pacific Far East Line, Inc., et al. Motion to Dismiss for Lack of Standing, February 20, 1967;

(d) American Union Transport, Inc. Motion to Dismiss for Failure to State a Claim, February 20, 1967;

(e) Waterman Steamship Corporation Motion to Dismiss, February 20, 1967, part 2;

(f) Matson Navigation Company Alternative Motion for Dismissal, March 30, 1967;

(g) Moore and McCormack Co. Motion for Summary Judgment, April 14, 1967, ground 3;

(h) American Export-Isbrandtsen Lines, Inc. Motion to Dismiss as to Plaintiff's Great Lakes Bengal Lines, Inc., et al., April 25, 1967;

(i) Grace Line Inc. Motion for Judgment in Its Favor as to Plaintiffs Great Lakes Bengal Lines, Inc., et al. to be filed no later than May 10, 1967;

4. Defendants shall take no more than 40 minutes, including rebuttal, if any, to argue the issues raised by the foregoing motions, or portions of motions, listed in paragraph 3.

5. Oral argument with respect to the foregoing motions, or portions of motions, listed in paragraphs 1 and 3 shall be presented on June 2, 1967.

6. With respect to the following motions, or portions of motions, all of which relate to differing matters pertaining to different defendants, no more than one defense counsel shall argue on behalf of *each* defendant, or group of defendants, as follows:

A. Venue and Service Motions

i. American Union Transport, Inc. Motion to Dismiss for Improper Venue, January 31, 1967—20 minutes (By stipulation of March 9, 1967, the disposition of this motion shall govern the disposition of the motion of February 7, 1967 by Central Gulf Steamship Corp., and Prudential Lines, Inc. for the same relief);

ii. AGAFBO and Stockard Shipping Co., Inc. Motion to Dismiss for Improper Venue, etc., February 7, 1967—25 minutes;

iii. WCAFBO Motion to Dismiss for Improper Venue, etc., February 20, 1967—20 minutes (With respect to the WCAFBO and AGAFBO Venue motions, it is not intended to waive by this Stipulation whatever rights WCAFBO and AGAFBO may have by virtue of plaintiffs' concession in their Memorandum in Opposition to These WCAFBO and AGAFBO Motions, dated April 21, 1967, pp. 6-7, that these defendants have not been properly served with the Summons and Complaint in this action).

B. Summary Judgment Motions Resting on Facts Peculiar to Individual Defendants

- i. Lykes Bros., et al. Motion for Summary Judgment February 7, 1967, insofar as it rests on "additional grounds" of defendants Alcoa, Bloomfield, Central Gulf, Prudential, Stevenson, Stockard and AGAFBO—25 minutes;
- ii. American Union Transport Motion for Summary Judgment, February 20, 1967, insofar as it rests on the foregoing "additional grounds"—15 minutes;
- iii. Matson Navigation Company Motion for Summary Judgment, March 30, 1967, second ground—20 minutes;
- iv. Farrell Lines, Inc. Motion for Summary Judgment, April 14, 1967—20 minutes;
- v. Moore and McCormack Co. Motion for Summary Judgment, April 14, 1967, part 4, insofar as it rests on the foregoing "additional grounds"—15 minutes;
- vi. Grace Line Inc. Motion for Judgment in Its Favor as to all Plaintiffs, to be filed no later than May 10, 1967, insofar as it rests on the foregoing "additional grounds"—10 minutes.

7. Oral argument on the foregoing motions, or portions of motions, listed in paragraph 6, shall be presented on June 9, 1967.

RONALD A. CAPONE
Attorney for Lykes Bros.
Steamship Co. Inc.; United
States Lines Company; Alcoa
Steamship Company, Inc.;
Bloomfield Steamship Compa-
ny; Central Gulf Steamship
Corporation; Prudential
Lines, Inc.; Stevenson Line,
Inc.; Stockard Shipping Co.,
Inc.; Atlantic & Gulf Ameri-
can Flag Berth Operators

AMY SCUPI

Attorney for American Union
Transport, Inc.

ROBERT S. BURK

Attorney for Matson Naviga-
tion Company

JOHN K. MALLORY, by JOHN M. STOKES, of Counsel.

Attorney for Waterman
Steamship Corporation

FREDERICK M. ROWE

Attorney for Pacific Far East Line,
Inc.; States Marine Lines, Inc.;
American President Lines, Ltd.;
American Mail Line, Ltd.;
Isthmian Lines, Inc.; States Steam-
ship Company; West Coast American
Flag Berth Operators

JAMES N. JACOBI

Attorney for American Export
Isbrandtsen Lines, Inc.

VERNE W. VANCE, JR.

Attorney for Farrell Lines, Inc.

J. F. FORT

Attorney for Moore and McCormack
Co., Inc.

DONALD J. MULVIHILL

Attorney for Grace Line Inc.

The procedures outlined in the foregoing stipulation
among defendants for the presentation of oral argument
on their various pending motions are not objected to.

ROBERT E. SHER

Attorneys for Plaintiffs

Dated: May 9, 1967

(Filed May 11, 1967)

Plaintiffs' Statement of Genuine Issues

Plaintiffs, in opposition to the motions for summary judgment filed by defendants, submit this statement of material facts as to which plaintiffs contend there exist genuine issues necessary to be litigated.

I.

With respect to the motion filed by defendants Lykes Bros. Steamship Co., Inc., United States Lines Company, Alcoa Steamship Company, Inc., Bloomfield Steamship Company, Central Gulf Steamship Corporation, Prudential Lines, Inc., Stevenson Line, Inc., Stockard Shipping Co., Inc., and Atlantic & Gulf American-Flag Berth Operators:

1. Plaintiffs assert that paragraphs 1 and 2 in defendants' Statement of Material Facts are not statements of facts at all, within the meaning of Rule 9(h) or otherwise, but are conclusions based upon defendants' construction of the complaint. The complaint speaks best for itself and, if it is to be construed, it is for the Court to construe it.
2. To the extent that paragraphs 1 and 2 of defendants' Statement may be regarded as statements of fact, plaintiffs actually in good faith controvert said statements. Their complaint is not based upon the service of Pacific Seafarers, Inc. and Seafarers in the Far East interport trade between Taiwan, Thailand and South Vietnam. Defendants Alcoa, Bloomfield, Central Gulf, Prudential, Stevenson and Stockard were not made defendants in this action *solely* because of their membership in AGAFBO.
3. There is a genuine issue as to the nature of the trade and commerce involved in this case engaged in by the plaintiffs and by the defendants.
4. The complaint alleges that the Far East interport trade is an integral part of defendants' service to and

from the United States. Unless this allegation is admitted, there is a genuine issue with respect thereto.

5. There is a genuine issue as to the relationship of the United States Government, through its Agency for International Development (AID), to the trade in question.

6. There is a genuine issue as to whether defendants engaged in a combination and conspiracy and concert of action to monopolize the Far East interport portion of their foreign trade for the benefit of certain of the defendants.

7. There is a genuine issue as to whether defendants engaged in a combination and conspiracy and concert of action to eliminate the competition of others from the Far East interport trade, and, in particular, the competition of plaintiffs.

8. There is a genuine issue as to whether defendants engaged in a combination and conspiracy and concert of action to obtain for themselves the highest possible amount of AID funds through maintenance of their rate-fixing agreement.

9. There is a genuine issue as to the effect of the activities of the defendants in the Far East interport trade upon the United States and its foreign commerce.

10. There is a genuine issue as to the effect upon plaintiffs of the activities of defendants as alleged in the complaint.

11. There are genuine issues as to all the allegations of the complaint except to the extent that they might be admitted by defendants.

II.

With respect to the motion filed by American Export Isbrandtsen Lines, Inc. (AEIL):

12. Plaintiffs assert that AEIL's Statement of Material Fact is not a statement of fact at all, within the meaning of Rule 9 (h) or otherwise, but is a conclusion based upon defendant's construction of the complaint. The complaint speaks best for itself and, if it is to be construed, it is for the Court to construe it.

13. To the extent that defendant's Statement may be regarded as a statement of fact, plaintiffs actually in good faith controvert said statement. The complaint is not based upon the service of Pacific Seafarers, Inc. and Seafarers in the Far East interport trade from Taiwan and Thailand to South Vietnam.

14. Plaintiffs hereby incorporate herein by reference and state as genuine issues, with the same force and effect as though they were here set forth in full, the genuine issues set forth above in paragraphs 3 to 11, inclusive.

III.

With respect to the motion filed by American Union Transport, Inc. (AUT):

15. Plaintiffs assert that the statements contained in paragraph 1 and the second sentence of paragraph 2 of AUT's Statement of Material Facts are not statements of fact at all, within the meaning of Rule 9 (h) or otherwise, but are conclusions based upon AUT's construction of the complaint. The complaint speaks best for itself and, if it is to be construed, it is for the Court to construe it.

16. To the extent that the statements in paragraph 1 and the second sentence of paragraph 2 of AUT's Statement may be regarded as statements of fact, plaintiffs actually in good faith controvert such statements.

17. Plaintiffs hereby incorporate herein by reference and state as genuine issues, with the same force and effect as though they were here set forth in full, the genuine issues set forth above in paragraphs 3 to 11, inclusive.

IV.

With respect to the motion filed by Matson Navigation Company (Matson):

18. Plaintiffs actually in good faith controvert each and every of the statements contained in paragraphs 1, 3, 5, and 6 of Matson's Statement of Material Facts. Paragraph 2 of said Statement is partially true; plaintiffs actually in good faith controvert the implications contained in such partial statement. Paragraph 4 of said Statement is wholly immaterial.

19. Paragraph 7 of Matson's Statement does not contain statements of fact at all, within the meaning of Rule 9 (h) or otherwise, but is a series of conclusions of law. Moreover, the statements in said paragraph 7, whether of fact or of law, are wholly immaterial. To the extent that said paragraph 7 may be regarded as containing statements of fact, plaintiffs actually in good faith controvert said statements.

20. Plaintiffs hereby incorporate herein by reference and state as genuine issues, with the same force and effect as though they were here set forth in full, the genuine issues set forth in paragraphs 3 to 11, inclusive.

V.

With respect to the motion filed by Farrell Lines, Inc. (Farrell):

21. Plaintiffs actually in good faith controvert the statements contained in paragraphs 8, 9, and 10 of Farrell's Statement of Material Facts.

22. Plaintiffs assert that paragraph 1 in Farrell Statement is not a statement of fact at all, within the meaning of Rule 9 (h) or otherwise, but is a conclusion based upon Farrell's construction of the complaint. The complaint speaks best for itself and, if it is to be construed, it is for the Court to construe it. To the extent that said para-

graph 1 may be regarded as a statement of fact, plaintiffs actually in good faith controvert it.

23. The first two clauses of paragraph 2 of Farrell's Statement are, even if true, wholly immaterial. The third clause in said paragraph 2 is not a statement of fact, but is a legal conclusion and, in any event, is wholly immaterial.

24. Plaintiffs assert that it is immaterial whether Farrell was a "member" of AFBO or a "party" to an AFBO rate agreement, as Farrell has used those words in paragraph 3 of its Statement. Plaintiffs actually in good faith controvert the statements made in said paragraph 3 and the implications contained in such statements.

25. Paragraphs 4 and 5 of Farrell's Statement are wholly immaterial to the issues of this case.

26. Plaintiffs actually in good faith controvert the statements made in paragraph 7 of Farrell's Statement. The statements in the first part of said paragraph, relating to not having "attended any meeting or engaged in any discussion," are immaterial.

27. There is a genuine issue as to the extent and duration of the aid given by AGAFBO and its members, including Farrell, to the conspiracy alleged in the complaint.

28. Plaintiffs hereby incorporate herein by reference and state as genuine issues, with the same force and effect as though they were here set forth in full, the genuine issues set forth above in paragraphs 3 to 11, inclusive.

VI.

With respect to the motion filed by Moore and McCormack Co., Inc. (Mormac):

29. Paragraph 1, 2, and 3 of Mormac's Statement of Material Facts are not statements of fact at all, within the meaning of Rule 9(h) or otherwise, but are legal

arguments and, therefore, under Rule 9 (h) need not be controverted by plaintiffs. Such statements are, moreover, whether regarded as facts or as legal arguments, untenable, and plaintiffs actually in good faith controvert each of them.

30. Plaintiffs actually in good faith controvert the implications of paragraph 1 of Mormac's Statement. The acts complained of in this action are set forth in the complaint, which speaks best for itself. Whether or not those acts formed the basis of a proceeding before the Federal Maritime Commission is wholly immaterial to this action.

31. Plaintiffs actually in good faith controvert both the factual accuracy and the legal implications of paragraph 2 of Mormac's Statement. The Maritime Commission proceeding was dismissed solely for want of jurisdiction, for the want of which the Commission did not address itself to the merits.

32. Plaintiffs actually in good faith controvert both the factual accuracy and the legal implications of paragraph 3 of Mormac's Statement. As the Maritime Commission lacked jurisdiction, the issues were not properly before it and no factual disputes were resolved.

33. The relationships among the plaintiffs are set forth in the complaint. Plaintiffs actually in good faith controvert any factual or legal implications that are contained in the word "privity" in paragraph 4 of Mormac's Statement, to the extent that such word may imply any relationships other than those set forth in the complaint.

34. Plaintiffs assert that the statements in paragraph 5 (a) and (b) of Mormac's Statement are wholly immaterial even if true. Plaintiffs actually in good faith controvert the statements in paragraph 5 (c), (d), (e), and (f) of Mormac's Statement.

35. Plaintiffs hereby incorporate herein by reference and state as genuine issues, with the same force and effect as though they were here set forth in full, the genuine issues set forth above in paragraphs 3 to 11, inclusive.

VII.

With respect to the motion filed by Grace Line, Inc. (Grace):

36. Plaintiffs assert that paragraph 1 in Grace's Statement of Material Facts is not a statement of facts at all, within the meaning of Rule 9 (h) or otherwise, but constitutes a conclusion based upon Grace's construction of the complaint. The complaint speaks best for itself and, if it is to be construed, it is for the Court to construe it. To the extent that said paragraph 1 may be regarded as a statement of fact, plaintiffs actually in good faith controvert said statement.

37. Plaintiffs actually in good faith controvert the statements in paragraph 2 of Grace's Statement.

38. Paragraph 3 of Grace's Statement is wholly immaterial to the issues of this action.

39. Plaintiffs assert that paragraph 4 of Grace's Statement is not a statement of fact at all, within the meaning of Rule 9 (h) or otherwise, but constitutes a conclusion based upon Grace's construction of the complaint. The complaint speaks best for itself and, if it is to be construed, it is for the Court to construe it. To the extent that said paragraph 4 may be regarded as a statement of fact, it is only partially true, and plaintiffs actually in good faith controvert any implications that may be contained in such partial truth.

40. Plaintiffs actually in good faith controvert the statements contained in paragraphs 6 and 7 of Grace's statement.

41. Plaintiffs actually in good faith controvert both the factual accuracy and the legal implications of paragraph 8 of Grace's Statement. The subject matter of this action is set forth in the complaint herein, which speaks best for itself. Whether or not that subject matter was previously before the Federal Maritime Commission is wholly immaterial to this action. No claims in this action were rejected in the Maritime Commission's proceedings referred to in paragraph 8 of Grace's Statement. Those proceedings were dismissed solely for want of jurisdiction, for the want of which the Commission did not address itself to the merits.

42. Plaintiffs hereby incorporate herein by reference and state as genuine issues, with the same force and effect as though they were here set forth in full, the genuine issues set forth above in paragraphs 3 to 11, inclusive.

Respectfully submitted,

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Jamaica, New York
Of Counsel

**Statement of The Court at the Conclusion of Oral Argument
on June 2, 1967**

The Court: Gentlemen, I thank you very much for your very learned arguments.

I must say to you that prior to coming on the bench today I have had an opportunity over the past several days to review the pleadings very carefully and to review the briefs which have been filed.

I don't see any benefit that will arise from me taking the matter under advisement. I am prepared to rule at this time.

I am of the opinion that the complaint does not state facts constituting a cause of action under the Sherman Antitrust Act and, therefore, the Court is without jurisdiction and the motions to dismiss will be granted.

Does that dispose of the other motions as well?

Mr. Mallory: It does dispose of the other motions as well.

Mr. Sher: Yes.

The Court: Very well, thank you, gentlemen.

(Whereupon the hearing on the motions was concluded.)

(Filed June 9, 1967)

Order

Plaintiffs filed their complaint on November 18, 1966 alleging violations of Sections 1-3 of the Sherman Act, 15 U.S.C. §§ 1-3, by the named defendants.

As listed in paragraph 1 of the stipulation filed with the Court on May 10, 1967, defendants have filed motions contesting this Court's jurisdiction over the subject matter of the complaint.

Upon consideration of the legal memoranda of the parties, and of the oral arguments by counsel presented thereon on June 2, 1967, in accordance with paragraphs 1 and 2 of the aforesaid stipulation, it appears that this Court is without jurisdiction over the subject matter of this cause.

Accordingly, it is this 9th day of June, 1967:

ORDERED that the complaint be, and it hereby is, dismissed in its entirety.

It further appears that this Court's determination that it is without jurisdiction over the subject matter makes it unnecessary to consider any other motions pending in this cause as listed in paragraphs 3 and 6 of the aforesaid stipulation.

JOSEPH C. McGARRAGHY
Joseph C. McGarraghy
United States District Judge

Seen: _____

Attorney for Plaintiffs

(Filed June 27, 1967)

Notice of Appeal

Notice is hereby given this 27th day of June 1967, that plaintiffs Pacific Seafarers, Inc, Seafarers, Inc., Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp. and J. J. Georgelis, Inc. hereby appeal to the United States Court of Appeals for the District of Columbia from the Order and Judgment of this Court entered on the 9th day of June 1967, dismissing the complaint in its entirety.

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BRIEF FOR APPELLANTS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21173

PACIFIC SEAFARERS, INC., ET AL., *Appellants*,

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Appellees*.

Appeal From Order and Judgment of the United States District
Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

Appellees are American shipping lines engaged, as part of their commerce to and from the United States, in carrying foreign assistance cargoes between Taiwan, Thailand and Saigon, the cost of which cargoes and the freight charges for which are paid for with funds provided by the United States Government. Appellants are also American shipping lines which competed with appellees in the carriage of such cargoes.

The questions presented are:

1. Did the district court lack jurisdiction over a complaint charging appellees with a conspiracy under the Sherman Act to put appellants out of business.
2. Should such an issue be disposed of summarily on motions to dismiss.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21173

PACIFIC SEAFARERS, INC., ET AL., *Appellants*,

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Appellees*.

Appeal From Order and Judgment of the United States District
Court for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from an order and judgment of the United States District Court for the District of Columbia, entered June 9, 1967, dismissing the complaint for lack of jurisdiction over the subject matter (J.A. 167-8). Notice of appeal was filed June 27, 1967 (J.A. 169). This Court has jurisdiction to review the order and judgment of the district court under 28 USC 1291. The jurisdiction of the district court was asserted under 15 USC 15 to recover damages from appellees resulting from their alleged violations of Sections 1, 2, and 3 of the Sherman Act, 15 USC 1, 2 and 3.

STATEMENT OF THE CASE

Appellants Pacific Seafarers, Inc. (PSI), Seafarers, Inc. (Seafarers), Great Lakes Bengal Lines, Inc. (Great Lakes) and Mid-America Steamship Corporation (Mid-America) are American corporations engaged in the ocean shipping business. Appellant J. J. Georgelis, Inc. (Georgelis) is an American corporation which acted as managing agency for the other appellants (J.A. 6-7). Appellants (other than Georgelis) operated American-flag vessels, manned by American crews hired in the United States. All of the appellants maintained offices and a staff in New York City, from which all their operations were managed and directed, including arranging for fuel supplies for the vessels, repairs and maintenance, insurance and financing (J.A. 12). Appellants' vessels, as alleged in the complaint, were engaged in the foreign commerce of the United States (J.A. 13). They started on their voyages from ports in the United States and returned to this country upon completion of their service abroad. Whenever repairs to the vessels were required, the work was done in this country (J.A. 12).

Appellees are likewise American corporations engaged in the ocean shipping business, except for two unincorporated trade associations in one or the other of which each of the corporate appellees is a member. The corporate appellees are all common carriers by water engaged in the transportation of property to and from various ports in the United States and ports in other countries (J.A. 11). Their offices are located in the United States, and they direct and control their operations, including forming and engaging in the combination and conspiracy hereinafter described, from the United States (J.A. 11). The corporate appellees operate American-flag vessels, manned by American crews hired in the United States (J.A. 11). Their vessels are provisioned and repaired primarily in the

United States (J.A. 11); and at least those engaged in the Far East trade which gives rise to this action begin and end their voyages in the United States (J.A. 11). Most of the corporate appellees are government-subsidized lines, receiving operating-differential subsidies or construction-differential subsidies, or both, from the United States Government (J.A. 11).

The complaint alleges that appellees Pacific Far East Line, Inc. (PFEL), States Marine Lines, Inc. (States Marine), American President Lines, Ltd. (APL), Waterman Steamship Corporation (Waterman), American Export-Isbrandtsen Lines, Inc. (American Export), American Mail Line, Ltd. (American Mail), Isthmian Lines, Inc. (Isthmian), Lykes Bros. Steamship Co., Inc. (Lykes), States Steamship Co. (States Steam), and United States Lines Co. (U. S. Lines), are engaged in the transportation of property to and from the United States and the Far East (J.A. 11); that as part of their service between the United States and the Far East their ships pick up cargo at Far East ports and deliver it to other Far East ports; that this part of their service, which is commonly referred to as the "Far East interport trade", is an integral part of their service to and from the United States (J.A. 11).

This Far East interport trade represents an important part of the total revenues of appellees. In the course of the administrative hearing before the Federal Maritime Commission, to which further reference will be made hereinafter, appellee States Marine's Far East services traffic manager testified that his company averaged 10 to 11 sailings a month from the west coast of the United States to the Far East; that as part of the service from the United States, the vessels pick up cargo at Far East ports and drop it off at other Far East ports; that States Marine has been in this interport business for many years "and

it is an enormous part of our business" (J.A. 142-4). He further testified:

The interport is a very important part of our world-wide services. Therefore, it obviously plays a very large part in the scheduling of our ships (J.A. 144).¹

The complaint alleges that there has been at all times material to the action a substantial amount of interport traffic in the Far East the funds for which are provided by the United States government, largely through its Agency for International Development (AID) (J.A. 11-12). AID is the agency primarily responsible for carrying out the foreign aid program of the United States, the underlying object and purpose of which is to maintain the security and promote the foreign policy of this country through military, economic and technical assistance to friendly countries. The very comprehensive declaration of policy adopted by the Congress in connection with the foreign aid program states, in part, as follows (22 USC 2151):

It is the sense of the Congress that peace depends on wider recognition of the dignity and interdependence of men, and survival of free institutions in the United States can best be assured in a world-wide atmosphere of freedom.

To this end, the United States has in the past provided assistance to help strengthen the forces of freedom by aiding people of less developed free countries of the world to develop their resources and improve their living standards, to realize their aspirations for justice, education, dignity, and respect as individual human beings, and to establish responsible governments.

More specifically, as applied to the issues here presented, the declaration of policy provides:

It is the sense of the Congress that assistance authorized by this chapter should be extended to or withheld

¹ According to the same witness 80 per cent of the interport cargo carried by his company is paid for by the Agency for International Development (AID), and another 15 per cent by other government agencies (J.A. 143-4).

from the government of South Vietnam, in the discretion of the President, to further the objectives of victory in the war against communism and the return to their homeland of Americans involved in that struggle.

In furtherance of the foreign aid program, AID provides funds by way of loans or grants, or both, to friendly foreign governments for the purchase of equipment, materials or commodities needed by them; and it also provides funds for the payment of the costs of transportation incurred in connection therewith (J.A. 145-6).

Section 901(b) of the Merchant Marine Act of 1936, as amended, (46 USC 1241(b)), requires that at least 50 per cent of the gross tonnage of equipment, materials or commodities obtained with funds or credits advanced to or for the account of any foreign nation without provision for reimbursement must be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates. This statutory provision has been made applicable to funds and credits provided by AID by that agency's Regulation 1, Section 201.6(N) (J.A. 146). As a matter of policy, AID pays the entire cost of transportation where the cargo is transported on privately-owned United States-flag commercial vessels (J.A. 147). Thus, while a recipient government has the option of transporting 50 per cent of the tonnage of materials, equipment and supplies on foreign-flag vessels, if it exercises that option it must pay the ocean freight charges from its own funds. In order to maximize the use of AID funds for the payment of ocean freight most foreign governments, and particularly the government of South Vietnam, require the use of privately-owned United States-flag commercial vessels to the extent that they are available (J.A. 147). As a result, AID cargoes have been shipped almost exclusively on United States-flag lines (J.A. 11-12).

For some time beginning prior to 1962, appellees PFEL, States Marine, APL, Waterman, American Export, Ameri-

can Mail, Isthmian, Lykes, States Steam, and U. S. Lines have been engaged in transporting AID cargoes from United States ports to various ports in the Far East (J.A. 12-13). In the course of their trips to and from the United States, the vessels of such appellees have picked up AID cargo at various Far East ports and delivered it to other Far East ports (J.A. 11).

Since May of 1959 such appellees have been parties to an agreement fixing the rates applicable to such Far East interport cargo (J.A. 12). This rate agreement was issued and published under the name of an organization known as American Flag Berth Operators (AFBO), in which all of such appellees were listed as members (J.A. 12). The rates established by this agreement were adhered to by the AFBO members in the Far East interport part of their trade to and from the United States (J.A. 12). This rate agreement was neither submitted to nor approved by the Federal Maritime Commission (J.A. 12).

In 1962 appellants PSI and Seafarers began to compete with the AFBO member appellees in the Far East interport trade. They began to provide a service based primarily on the transportation of AID cargoes from Taiwan and Thailand to South Vietnam. Cement and fertilizer were the basic cargoes upon which this service was built, but appellants also carried substantial quantities of AID general cargoes as well. The funds for the transportation of such cargoes, as well as for the cargoes themselves, were provided by the United States government (J.A. 12). As previously stated, appellants' vessels were American-flag vessels manned by American crews hired in the United States.

The complaint alleges that beginning at least as early as 1962 appellees entered into a combination and conspiracy to drive appellants out of business, and particularly out of the Far East interport trade (J.A. 13). The objects and purposes of the combination and conspiracy

were (1) to retain the AID business for the benefit of the appellee lines that were members of AFBO, and (2) to obtain for such lines the highest possible amount of AID funds through the perpetuation and maintenance of the AFBO rate-fixing agreement referred to above (J.A. 13).

Pursuant to such combination and conspiracy appellees made a number of attempts to drive PSI and Seafarers out of business. They first attempted to eliminate PSI and Seafarers as competitors of appellees by securing the issuance of a directive limiting AID shipments in the area to American-flag "conference liners" (J.A. 13-14). When this did not succeed, appellees prevailed on the Director General of Commerce of South Vietnam to require that all future AID shipments of cement to South Vietnam be on liners operated by members of AFBO (J.A. 14). This directive was countermaned by AID (J.A. 14). PSI was then advised by the Director General of Commerce that as a condition to its continued participation in the South Vietnam cement business, it must become a member of the West Coast American Flag Berth Operators (WCAFBO) conference (J.A. 14-15). When PSI applied for membership in WCAFBO, it was advised that it was ineligible for membership because it did not have a contract with the Military Sea Transportation Service (MSTS) of the Department of Defense (J.A. 15). When PSI applied to the Department of Defense for an MSTS contract, the secretary of WCAFBO filed a protest against it on behalf of seven of the appellees, based on grounds that were false and untrue, and known by such appellees to be false and untrue, at the time (J.A. 15). Nonetheless, PSI was approved for an MSTS contract and, shortly thereafter, was admitted to membership in WCAFBO (J.A. 15).

When the attempts described above failed to drive PSI and Seafarers out of business, appellees decided that more drastic action was required, i.e., resort to predatory price-cutting. This decision was made at an AFBO meeting in

this country, followed by the telephoned concurrence of those members who were not present. Under the AFBO rate-fixing agreement above referred to, the rate for transporting cement from Taiwan to South Vietnam was \$8.95 per long ton. The AFBO members agreed among themselves to "open" the rate on cement and fertilizer, the two basic commodities essential to the continuance of appellants' service (J.A. 15-16). The "opening" of the rates meant that the agreed-upon rates were no longer effective for those two commodities (J.A. 15-16). The rate on cement from Taiwan to South Vietnam was immediately reduced by appellees from \$8.95 per long ton to as low as \$4.96 per long ton (J.A. 16). All rates other than those on cement and fertilizer were maintained at their pre-existing AFBO levels (J.A. 15-16).

The purpose of the drastic reduction in rates on cement and fertilizer was to cause appellants to operate at a loss and force them out of business (J.A. 16). The plan succeeded. Appellants attempted to stay in business by reducing their sailings, but finally had to give up (J.A. 16). After PSI and Seafarers were driven out of business, the rates on cement and fertilizer were restored by appellees to their former levels and, subsequently, were substantially increased (J.A. 16).

The complaint further alleges that Atlantic & Gulf American Flag Berth Operators (AGAFBO) is a conference of American-flag berth operators serving world-wide from and to United States Atlantic and Gulf ports, organized with the approval of the Federal Maritime Commission, to negotiate with MSTS (J.A. 10). West Coast American Flag Berth Operators (WCAFBO) is a similar conference of American-flag berth operators serving world-wide from and to United States west coast ports (J.A. 10). The activities of both these conferences are, by their charters, limited exclusively to MSTS and military cargoes (J.A. 10). Neither of them is authorized to deal with AID cargoes or shipments. (J.A. 10). All of the corporate ap-

appellees are members of either AGAFBO or WCAFBO (J.A. 10-11). The complaint alleges that with the consent and acquiescence of all of the corporate appellees, the services, organizations and personnel of AGAFBO in New York City and WCAFBO in San Francisco were used to effectuate the combination and conspiracy above described (J.A. 10-11).

In April of 1963, appellant Pacific Seafarers filed a complaint with the Federal Maritime Commission charging that certain of the acts of appellees complained of in this action were violative of Section 15 of the Shipping Act of 1916. Following extensive hearings, the Commission's Hearing Examiner made detailed findings on the factual issues relating to the merits of the complaint as well as with respect to the jurisdiction of the Commission (J.A. 54-111). The case was taken to the Commission on complainant's Exceptions to the Initial Decision and Findings of the Hearing Examiner. The Commission disposed of the case on purely jurisdictional grounds (J.A. 111-120). The Report of the Commission states (J.A. 115):

Apart from the asserted violations of the Act, we are first confronted with the issue of jurisdiction. It is our judgment that the reach of the Act and, consequently, our jurisdiction, does not extend to the matters complained of.

The Commission concluded its Report as follows (J.A. 120):

Since we have no jurisdiction in the premises, we shall not address ourselves to the other contentions raised by complainants. Accordingly,

It Is Ordered, That the complaint is hereby dismissed.

Hence, the only thing that the Federal Maritime Commission decided was that it was without jurisdiction to act on the complaint.

The complaint in this action alleges that as a direct result of the combination and conspiracy described above,

appellants PSI and Seafarers were driven out of business (J.A. 16). Their offices in New York were closed, their employees dismissed, and their contracts for services and supplies cancelled (J.A. 16-17). The complaint further alleges that the financial well-being of appellants PSI and Seafarers was the keystone to the financial well-being of the other appellants. PSI, Seafarers, Great Lakes and Mid-America chartered, leased, and otherwise exchanged vessels among themselves; they made loans and pledged credit among themselves and with others in order to finance their respective business transactions (J.A. 17). When PSI and Seafarers were forced out of business, the other appellants, including Georgelis, were likewise forced out of business (J.A. 17). The complaint concludes with a prayer for damages and other relief, as provided in the antitrust laws (J.A. 17-18).

To this complaint three of the appellees filed answers (J.A. 19-25; 29-33; 120-127). Motions of various kinds were filed by the others. There were motions to dismiss on the ground that the district court was without jurisdiction over the subject matter (J.A. 36-37). There were also motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure on the same ground, which were treated by the parties, as well as by the court below, as the equivalent of motions to dismiss. Other motions raised questions as to venue and service of process, the standing to sue of certain of the appellants, and the sufficiency of the conspiracy allegations as affecting certain of the appellees. By stipulation of the parties, and with the approval of the court, it was agreed that the motions dealing with the jurisdiction of the court should be heard first (J.A. 153-7).

Those motions were argued on June 2, 1967. At the conclusion of the argument, the court below disposed of the matter as follows from the bench:

I am of the opinion that the complaint does not state facts constituting a cause of action under the

Sherman Antitrust Act and, therefore, the Court is without jurisdiction and the motions to dismiss will be granted. (J.A. 167)

No reasons for this ruling were given by the court below, either then or later.

On June 9, 1967, an order was entered dismissing the complaint in its entirety on the ground that the court was without jurisdiction over the subject matter of the action (J.A. 167-8). The order further recited that this determination made it unnecessary to consider any other motions pending in the cause (J.A. 168). This appeal followed. (J.A. 169)

STATUTES AND REGULATIONS INVOLVED

Relevant parts of the Constitution, statutes and regulations involved are set forth in the Appendix hereto.

STATEMENT OF POINTS

1. The court below erred in holding that it was without jurisdiction over the subject matter of the action.
2. The court below erred in holding that the complaint fails to state a cause of action for violation of the federal antitrust laws.
3. The court erred in disposing of the case on the pleadings.

SUMMARY OF ARGUMENT

In this action for damages under the antitrust laws appellees, American shipping line operators, brought suit against a number of other American shipping lines charging them with entering into a combination and conspiracy to drive appellants out of business and eliminate them as competitors. The complaint alleges that appellants and appellees were engaged in foreign commerce; and that the business for which they competed was an integral part of

that commerce. The court below granted appellees' motions to dismiss for want of jurisdiction.

Accepting the allegations of the complaint as true, the jurisdiction of the court is clear. The Supreme Court has stated on a number of occasions that in enacting the Sherman Act Congress exercised its constitutional power to regulate commerce to the fullest extent. And the constitutional power of Congress as applied to this case is not open to question. Indeed, its power over foreign commerce, and particularly over ships and shipping, exceeds its power to regulate interstate commerce.

The complaint alleges that appellants were engaged in foreign commerce; but even if they were not the Sherman Act would nonetheless be applicable. For it is well settled that an action for damages will lie against members of a conspiracy who are engaged in interstate or foreign commerce even where the victim of the conspiracy is not himself so engaged.

The combination and conspiracy eliminated appellants as competitors of appellees, not only in the Far East area directly affected, but also here at home. Appellants were forced out of business entirely, their New York headquarters were closed, and the many foreign commerce activities operated and directed from there discontinued. Such an impact on the foreign commerce of the United States is clearly within the ambit of the Sherman Act. Appellees' conduct does not escape the reach of that Act merely because part of that conduct occurred abroad.

But other national interests of the United States were also directly affected. The cargoes for whose carriage appellants and appellees had been competitors were cargoes (including freight charges) bought and paid for with United States government funds. Appellees' combination and conspiracy thus had a direct impact upon this country's foreign assistance program as administered by AID.

That the Federal Maritime Commission lacked jurisdiction of an earlier proceeding brought by some of appellants seeking reparations is not material in determining whether the district court had jurisdiction of this proceeding under the Sherman Act. It is now well settled that the jurisdiction of the Commission, which derives from the Shipping Act, is more limited than that of the courts under the Sherman Act. And, as the Commission lacked jurisdiction, the findings of its Examiner on the merits are a nullity and must be disregarded.

Finally, the court below erred in disregarding the admonitions of both this Court and the Supreme Court, against summary disposition of antitrust litigation of this complexity. Summary procedures are highly inappropriate means of disposing of basic jurisdictional questions under the Commerce Clause and the Sherman Act.

ARGUMENT

I

The Sherman Act Is Applicable to the Combination and Conspiracy Alleged in the Complaint

The complaint alleges that the appellees, in the course of providing a transportation service between the United States and the Far East, have their vessels pick up and deliver cargo at ports along the way; and that this "inter-port" business is an integral part of their service to and from the United States (J.A. 11). That the transportation service between this country and the Far East is "foreign commerce" as that term is used in the Constitution and statutes of the United States is not open to question and, indeed, is not denied. If appellants had been engaged in providing a competitive transportation service all the way from the United States to the Far East and back, a combination and conspiracy among appellees to drive appellants out of business would present a classic case of Sherman Act violation. And the jurisdiction of the

encompassed the power to prescribe all laws concerning navigation including, among others, the power to prescribe what shall constitute American vessels, to require that they shall be navigated by American seamen, and to impose embargoes.

The doctrine of *Gibbons v. Ogden* has been reaffirmed by the Supreme Court on numerous occasions, most recently in *Atlanta Motel v. United States*, 379 U.S. 241 (1964), where Title II of the Civil Rights Act of 1964 was upheld as a valid exercise of the commerce power. The Court there said (at 253):

Its [the Commerce Clause] meaning was first enunciated 140 years ago by the great Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23 (1824).

After quoting at length from the language of that opinion, the Court went on to say (at 255):

In short, the determinative test of the exercise of power by Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more states than one" and has a real and substantial relation to the national interest. (Emphasis added)

That test, though there applied specifically with reference to interstate commerce, is no less applicable to foreign commerce. Indeed, in *Atlantic Cleaners & Dyers, supra*, the Supreme Court indicated (286 U.S. at 434) that the "power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce."

Moreover, the power of Congress over ships and shipping exceeds that of its power over other kinds of foreign trade and commerce. In *White's Bank v. Smith*, 74 U.S. (7 Wall.) 646 (1869), upholding the power of Congress to

pass the Federal Recording Act of 1850, the Court said (at 655):

Ships or vessels of the United States are the creation of the legislation of Congress . . .

Ships or vessels not brought within these [the registration] provisions of the Act of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial if not entire value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the right and title of all persons dealing therein.

In *Providence & N.Y. Steamship Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883), the power of Congress to limit the liability of a ship-owner for loss or damage by fire was upheld, the Court saying (at 590):

We have no doubt that Congress had power to pass the law. It is not only a maritime regulation in its character, but it is clearly within the scope of the power given to Congress "to regulate commerce."

Other examples of the exercise of this power by the Congress are the Jones Act (46 USC § 688), providing a remedy for seamen injured in the course of their employment, and the Death on the High Seas Act (46 USC § 761). A further example is the applicability of the National Labor Relations Act (29 USC § 151) to American-flag vessels engaged in foreign commerce, which has been assumed almost without discussion. See *Panama R.R. Co.*, 2 NLRB 290 (1936); *National Labor Relations Board v.*

Waterman S.S. Corp., 309 U.S. 206 (1940); cf. *McCulloch v. Sociedad de Marineros de Honduras*, 372 U.S. 10 (1963).

The statutes referred to above have been held applicable whether the ship was in its home port, on the high seas, or in foreign ports. *McKie v. Diamond Marine Co.*, 204 F. 2d 132 (5 Cir. 1953); *Pollard v. Seas Shipping Co.*, 146 F. 2d 875 (2 Cir. 1945); *Gerradin v. United Fruit Co.*, 60 F. 2d 927 (2 Cir. 1932); *Morris v. United States*, 3 F. 2d 588 (2 Cir. 1924).

In other words, in dealing with ships the law of the flag applies. In *United States v. Flores*, 289 U.S. 137 (1933), the Court, after stating that generally speaking the criminal jurisdiction of the United States is based on the territorial principle and criminal statutes are not by implication given an extraterritorial effect, went on to say (at 155):

But that principle has never been thought to be applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty.

It was there held that a defendant could be tried in a Federal district court in this country for a murder allegedly committed while his ship was at anchor at a port in the Belgian Congo 250 miles inland from the mouth of a river.

In *Lauritzen v. Larson*, 345 U.S. 571, 585 (1953), a Jones Act case, the Court reiterated that the "law of the flag" is settled American doctrine as applied to merchant vessels and that "the weight given to the ensign overbears most other connecting events in determining the applicable law."

In brief, the rule applicable to ships and shipping is that the Constitution follows the flag. And, as *Atlantic*

Cleaners & Dyers, South-Eastern Underwriters Assn., Frankfort Distilleries, and the other cases cited above show, the Sherman Act follows the Constitution.

II

Both Appellants and Appellees Were Engaged in the Foreign Commerce of the United States; But Even If Appellants Had Not Been Engaged in Foreign Commerce, the Fact That Appellees Were So Engaged Brings the Case Within the Ambit of the Sherman Act

In the court below, appellees attempted to make it appear that the Far East interport trade is separate and distinct from their regular shipping service between the United States and the Far East. The short answer is that it is not.

The Far East interport trade is an integral part of appellees' regular service to and from the United States. The complaint so alleges and, for purposes of a motion to dismiss, that allegation must be taken as true. Paragraph 35 of the complaint contains the following allegation (J.A. 11):

As part of their service between the United States and the Far East said defendants pick up cargo at Far East ports and unload it at other Far East ports. This part of their service is sometimes referred to as the Far East interport trade. It is an integral part of their service to and from the United States.

This interport trade is a very important part of appellees' world-wide services and plays an important part in the scheduling of their ships (J.A. 144). In other words, it is part and parcel of appellees' regular stream of commerce between the United States and the Far East.

While appellants provided a regular service between Taiwan, Thailand, and South Vietnam, their vessels, too, started out from the United States, returned here for re-

pairs and maintenance, and ended their voyages here when their service in the Far East was completed. Thus, appellants' activities, too, were part and parcel of a stream of commerce which began and ended in the United States.

Since both appellants and appellees were engaged in the foreign commerce of the United States, the conspiracy among appellees to drive appellants out of that commerce was squarely within the reach of the Sherman Act.

Even if appellants' activities were limited to the Far East, i.e., to providing a service between Taiwan, Thailand and South Vietnam, the result would be the same. For they were in competition with appellees in that Far East trade; and appellees' Far East trade was part of their regular service to and from the United States. A combination and conspiracy among those engaged in interstate or foreign commerce to injure a competitor violates the Sherman Act whether or not the competitor is engaged in interstate or foreign commerce.

In *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945), the Court said:

The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act, retail outlets have ordinarily been the object of illegal price maintenance.

In *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), where a local baker in Santa Rosa, New Mexico, was driven out of business by practices not dissimilar from those complained of here, the Court said (at 119):

We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. *The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But*

the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. (Emphasis added)

In *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), a retail merchant in San Francisco brought suit against a number of manufacturers and distributors of appliances charging that they had conspired among themselves and with other retailers not to sell to Klor's or to sell to it only at discriminatory prices and on highly unfavorable terms. The trial court entered summary judgment for the defendants and the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court reversed, saying (at 213):

Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products *** It clearly has, by its "nature" and "character", a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. (Emphasis added)

Again, in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), the Court, citing *Klor's*, said (at 16):

There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant.

The teaching of the cases is that a conspiracy among defendants engaged in foreign commerce, which the complaint plainly alleges, is proscribed by the antitrust laws even if the plaintiffs, who are the victims of the conspiracy, are not themselves engaged in foreign commerce. The appellees here are like the *Mead's Fine Bread* defendants whose interstate business benefited from their destruction of the local bakery shop's business. And it is no more material here whether appellants were themselves engaged in foreign commerce than it was in *Mead's Fine Bread*, *supra*, that the victim was only a local merchant. It is the appellees' activities, in this case as in *Mead's*, that subjects them to the anti-trust laws.

In brief, it is not material whether appellants were engaged in foreign commerce. It suffices to state a cause of action that appellees were engaged in such commerce, and their conspiracy, while so engaged, is equally violative of the antitrust laws whether it was made applicable to the full extent of such commerce or only to a portion thereof.

III

The Commerce Here Involved and Appellees' Activities With Reference Thereto Have Such a Relationship to the National Interest as to Bring the Case Within the Ambit of the Sherman Act

Appellees argued below, and presumably will again, that the Sherman Act is applicable to combinations and conspiracies in restraint of foreign commerce only when the foreign commerce of the United States is directly affected; and that there is no such direct effect here. As we have

shown above, however, the direct effect of appellees' conspiracy on the foreign commerce of the United States is beyond question.

In any event, we submit that the rule established by the decided cases is quite different from that suggested by appellees.

In their briefs and argument below appellees relied heavily on the holding in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), that the Sherman Act was inapplicable to a claim that defendant had monopolized the banana trade and driven plaintiff out of business by instigating the Costa Rican government to seize plaintiff's properties in that country and turn them over to defendant. In that case the Court said (at 359):

A conspiracy in this country to do acts in another jurisdiction does not draw to itself these acts and make them unlawful, if they are permitted by local law.

However, subsequent decisions of the Supreme Court in comparable situations make it clear that the quoted language from the *American Banana* case is no longer the law. Thus, in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), it was held that a combination entered into within the United States to monopolize sisal produced in Mexico violated the Sherman Act even though defendants' control of Mexican production was aided by discriminatory legislation of Mexico, pursuant to which an official agency was established as the sole buyer of the product from the producers and one of the defendants became the exclusive selling agent of that governmental authority. The case was held to be "radically different" from the *American Banana* case for the reason, as stated at p. 276 of the opinion:

Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. . . . The United States complain of a violation of their laws within

their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. (Emphasis added)

More recently, in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), the Supreme Court said of the *American Banana* case that, viewed in its context, it "was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States." The Court held in the *Bulova Watch* case that the federal courts had jurisdiction to award relief to an American corporation against a citizen and resident of the United States for acts of trademark infringement and unfair competition consummated in a foreign country. The Court said (at 285):

The question thus is "whether Congress intended to make the law applicable" to the facts of this case. . . . As Mr. Justice Minton, then sitting on the Court of Appeals, applied the principle in a case involving unfair methods of competition: "Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States." *Branch v. Federal Trade Commission*, 141 F. 2d 31, 35 (1944). *Nor has this Court in tracing the commerce scope of statutes differentiated between enforcement of legislative policy by the Government itself or by private litigants proceeding under a statutory right* [Citing cases]. *The public policy subserved is the same in each case.* (Emphasis added)

In *Branch v. Federal Trade Commission*, 141 F. 2d 31 (7 Cir. 1944), from which the Court quoted with approval in the *Bulova Watch* case, *supra*, petitioner had operated a correspondence school, selling and distributing courses of

study by mail in Latin-American countries. The Federal Trade Commission found that he had engaged in unfair and deceptive acts and practices in the course of such business and ordered him to cease and desist. On appeal he contended that the Commission was without jurisdiction because all the alleged acts of misrepresentation took place in Latin-American countries. In rejecting this argument and sustaining the jurisdiction of the Commission, the Court said (at 34-35):

It is true that much of the objectionable activity occurred in Latin America; however, it was conceived, initiated, concocted, and launched on its way in the United States. That the persons deceived were all in Latin America is of no consequence. *It is the location of the petitioner's competitors which counts.*

The Federal Trade Commission does not assume to protect petitioner's customers in Latin America. . . . It seeks to protect foreign commerce. If that commerce was being defiled by a resident citizen of the United States to the disadvantage of other competing citizens of the United States, the United States had a right to protect such commerce from defilement and a nonresident may look to his sovereign for protection. . . . *The right of the United States to control the conduct of its citizens in foreign countries in respect to matters which a sovereign ordinarily governs within its own territorial jurisdiction has been recognized repeatedly.* (Emphasis added)

Whatever lingering doubts may have remained as to the demise of the *American Banana* doctrine, or, indeed, as to the jurisdiction of the court in this case, have been laid to rest by *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In that private treble action plaintiffs asserted, *inter alia*, that defendants had excluded them from the Canadian vanadium market. The trial court rejected plaintiffs' offer of proof as to the Canadian transaction on the ground that "whether or not this plaintiff was permitted to sell his material to a customer in Canada

was a matter wholly within the control of the Canadian Government." The Court of Appeals agreed. The Supreme Court reversed, holding that the offer of proof as to the Canadian transaction was relevant evidence of a violation of the Sherman Act. The Court said (at 704-06):

Respondents say that *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, shields them from liability. This Court there held that an antitrust plaintiff could not collect damages from a defendant who had allegedly influenced a foreign government to seize plaintiff's properties. But in the light of later cases in this Court respondents' reliance upon *American Banana* is misplaced. A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries [Citing cases].

With specific reference to the *Sisal* case, *supra*, the Court said: "Since the activities of the defendants had an impact within the United States and upon its foreign trade, *American Banana* was expressly held not to be controlling." The opinion then goes on to state (at 706):

In the present case petitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller. . . . What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. As in *Sisal*, the conspiracy was laid in the United States, was effectuated here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agents of a foreign government. (Emphasis added)

See also *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Pacific & A.R. & Nav. Co.*, 228 U.S. 87 (1913); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *United States v. Aluminum Co. of America*, 148 F. 2d 416

(2 Cir. 1945); *United States v. National Lead Co.*, 63 F. Supp. 513 (SD NY 1945), aff'd. 332 U.S. 319 (1947); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (DC Mass. 1950); and *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (DC Dist. of Col. 1960), in which contentions similar to those advanced here by appellees were considered and rejected by Judge Walsh.

The above decisions make it clear that the controlling test in each case is whether the activities of the defendants had an "impact within the United States and upon its foreign trade", or, as stated in *Atlanta Motel v. United States*, 379 U.S. 241, 255 (1964), whether they had "a real and substantial relation to the national interest." On either basis the complaint in this case clearly meets the test.

Here, as in *Continental Ore*, the conspiracy was conceived and planned in the United States and directed from here. It was effectuated both here and abroad. Appellees are American corporations, with offices and headquarters in the United States. They are all engaged in foreign commerce. Appellants, too, are American corporations with offices and headquarters in the United States. The object and purpose of the conspiracy was to eliminate appellants as competitors for part of the foreign commerce in which appellees engaged. This object and purpose were fully achieved by appellees. But the effect of the conspiracy went far beyond this. As alleged in the complaint (J.A. 16-17), the effect was to drive appellants completely out of business, necessitating the closing of their New York offices, from which all of appellants' operations were managed and directed, including the making of all arrangements for financing, insurance, fuel supplies, maintenance and repairs (J.A. 17); dismissing their employees; and cancelling their contracts for services and supplies. Appellees thus eliminated appellants as competitors not only in the Far East trade, but in all other trade as well. Appellants were

not only excluded from participation in the Far East inter-port portion of the foreign commerce of the United States, but also from all other foreign commerce activities in which appellants had theretofore engaged, including their headquarters activities in New York. The impact of the conspiracy both within the United States and upon its foreign trade is clearer here than it was in *Continental Ore, supra*.

That the conspiracy had "a real and substantial relation to the national interest" is likewise clear. The combination and conspiracy complained of here had to do with shipping paid for by the United States government very largely by funds provided by AID. As a matter of policy AID pays the entire cost of transportation of AID-financed materials, equipment, and commodities only when such cargo is carried on privately-owned United States-flag commercial vessels. As a result of this policy, foreign competition in the carrying of this cargo is, for all practical purposes, eliminated; and the business has been reserved almost entirely for United States-flag vessels. Having given appellees and other American shipping lines similarly situated a virtual monopoly of the AID transport business, can it be that the Government is without power to prevent appellees from combining and conspiring to raise prices or otherwise restrain trade?

In 1963 AID paid out \$6,700,000 for cement delivered from Taiwan to South Vietnam and \$1,962,000 for cement delivered from Thailand to South Vietnam (J.A. 146). It paid for both the cement and the freight. If, by agreement among the defendants, the freight rates are raised, that increase is paid for by the United States. It is of no consequence that AID does not itself procure the commodities or make the shipping arrangements, but delegates those functions to an official of South Vietnam. An increase in freight rates or in the price of cement has no effect whatever on the Government of South Vietnam or on the representative of that country who let the contract or

made the shipping arrangements. It is the United States government that pays the bill. A price-fixing conspiracy among American shipping lines engaged in carrying AID cargo has "a real and substantial relation to the national interest" regardless of where the cargo originates or where it is delivered. Indeed, in those circumstances the national interest is sufficiently great that, were there price overcharges, the United States would be the real party in interest to bring suit for recovery. *United States v. Standard Oil Co. of California*, 155 F. Supp. 121 (SD NY 1957), aff'd, 270 F. 2d 50 (2 Cir. 1959).

If an action for violation of the antitrust laws would lie if brought by the United States, it will likewise lie when brought by these appellants. For, as the Supreme Court held in *Steele v. Bulova Watch Company*, 344 U.S. 280, 285 (1952), in cases such as this the Court has not differentiated between the enforcement of the legislative policy by the Government itself and enforcement by private litigants proceeding under a statutory right. "The public policy subserved is the same in each case."

The activities of appellants had a direct impact upon the foreign assistance program of AID. As appears from the declaration of policy adopted by the Congress in connection with the Foreign Assistance Act of 1961, *supra*, AID and the foreign assistance program were created to carry out in the broadest and fullest sense the foreign policy of the United States. Any activity which interferes with that program, increases its cost, or prevents American citizens from participating therein has "a real and substantial relation to the national interest."

In sum, as the Supreme Court held in *Continental Ore*, *supra*, "in the light of later cases in [the Supreme] Court [appellees'] reliance upon *American Banana* is misplaced. A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct

complained of occurs in foreign countries." (370 U.S. at 704). Again, the conspiracy here, "As in Sisal, . . . was laid in the United States, was effectuated both here and abroad, and [appellees] are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government" (370 U.S. at 706), the Director General of Commerce of South Vietnam, or by the fact that the conspiracy had its most immediate impact upon appellants' Far East interport traffic in commodities, the price and freight charges for which were paid by the United States. In the circumstances, in view of the direct effect of appellees' activities upon the foreign commerce and interests of the United States, and in the light of the fact that in the Sherman Act Congress exercised the full extent of its constitutional power over interstate and foreign commerce, the conspiracy complained of is clearly within the ambit of the Sherman Act.

IV

The Determination of the Federal Maritime Commission That It Was Without Jurisdiction Has No Bearing on the Jurisdiction of the Court Under the Sherman Act

In the court below appellees argued that appellants should be denied relief under the Sherman Act because certain of them had been denied relief in an administrative proceeding before the Federal Maritime Commission. Since the court below gave no reasons for its ruling, there is no way of knowing whether it found this argument persuasive.

There are two answers to this contention. (1) The Commission denied relief for lack of jurisdiction and denial of relief by a court or agency without jurisdiction is no bar to a subsequent proceeding before a court or agency that does have jurisdiction and (2) the jurisdiction of the Maritime Commission, which stems from the Shipping Act of 1916, is much more limited than the jurisdiction of the federal district courts under the Sherman Act.

A case squarely in point on this issue is *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966). That was a treble damage action against a number of shipping lines and the conference of which they were members charging that they combined and conspired to increase the rate on evaporated milk shipped to the Philippine Islands. Defendants moved to dismiss on the ground that all anti-trust regulation of the rate-making activities of the shipping industry was repealed by the Shipping Act of 1916. The district court granted the motion and the Court of Appeals for the Ninth Circuit affirmed. The Supreme Court reversed, saying (at 216-219):

The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. . . . The creation of an antitrust exemption for rate-making activities which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt.

* * * * *

We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision such as the exemption provisions of the Shipping and Agricultural Acts. See, e.g., *United States v. Philadelphia National Bank*, 374 U.S. 321.

The historical background of the Shipping Act does not indicate that a different rule of construction should be applied in interpreting that Act. . . .

* * * * *

Therefore, it seems likely that the Committee really only wanted to give the shipping industry a limited

antitrust exemption. We do not believe that its purpose would be frustrated by the application of the antitrust laws to the implementation of conference agreements which have not been subjected to public scrutiny and examination by a governmental agency.

In concluding its opinion in the *Carnation* case, the Court disposed of an argument similar to that made by appellees in the court below as follows (at 224):

Petitioner participated in the proceedings before the Commission, but petitioner did not ask for reparations under the Shipping Act and, therefore, could not be accorded any. *Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act.* This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice. (Emphasis added)

Appellants' rights here can be no less when their proceedings before the Commission were dismissed for lack of jurisdiction.

Moreover, administrative agency decisions on antitrust matters are not given great weight in subsequent antitrust proceedings in the courts. The reasons are set forth in the opinion of the Supreme Court in *United States v. First City National Bank of Houston*, U.S. , 18 L. ed. 2d 151, 156 (1967):

Traditionally in antitrust actions involving regulated industries, the courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure. *United States v. Radio Corporation of America*, 358 U.S. 334, 3 L. Ed. 2d 354, 79 S. Ct. 457; *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 12 L. Ed. 2d 12,

84 S. Ct. 1044; United States v. Philadelphia National Bank, *supra*; United States v. First National Bank & Trust Co., *supra*.

That the jurisdiction of the Maritime Commission under the Shipping Act is more limited than that of the courts under the Sherman Act was recognized by counsel for the appellees in the administrative proceedings before the Commission. At the oral argument in that proceeding, which took place almost two years before the *Carnation* case was decided by the Supreme Court, counsel for the AFBO group of appellees stated (J.A. 148):

Commissioner Hearn: Well, in that case, you draw a distinction between foreign commerce of the United States and Section 15 here?

Mr. Poole: Yes.

* * * * *

What I am saying is it has been held, and I think it is true, that the jurisdiction under the Shipping Act is more restrictive than the jurisdiction under the anti-trust laws. That is why I objected to antitrust principles being dragged in by the heels, so to speak, to define the jurisdiction of the Commission under the Shipping Act.

Now that the Supreme Court has agreed with this position, appellees seem to be urging exactly the contrary. That this Court is not in agreement with appellees' present position is clear from the following comment in its opinion in *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 371 F. 2d 747, 759, n. 13 (DC Cir. 1966):

We are not to be taken as closing our eyes to petitioner's claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter. That issue is not for the Commission or the court in this proceeding. It suffices to say that agree-

ments not approved by the Commission are not protected from attack under the antitrust laws. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 932, 86 S. Ct. 781, 15 L. Ed. 2d 709, 851.²

V

**The Findings of the Maritime Commission's Examiner
Should Be Disregarded**

Appellees, having successfully persuaded the Maritime Commission that it lacked jurisdiction in the matter before it, placed great reliance below on the findings of the Maritime Commission's Hearing Examiner, as if those findings were determinative of the issues presented in this action. Those findings, however, were made by the Examiner in a proceeding of which the Commission found it had no jurisdiction, and as to which the Commission did not address itself. When the Commission dismissed the complaint for want of jurisdiction, the Examiner's findings on the merits, which at best could only be recommendatory (*Alcoa Steamship Co. v. Federal Maritime Com.*, 116 U.S. App. D.C. 143, 321 F. 2d 756, 758-59, n. 5 (1963); Administrative Procedure Act, § 8(a), 5 USC 1007(a)), fell with the entire Commission proceeding and became a nullity.

It is well settled that even a court's findings on the merits go for naught where the court has no jurisdiction. Thus, in *Rowe v. Nolan Finance Co.*, 79 U.S. App. D.C. 35, 142 F. 2d 93 (1944), the district court had dismissed the complaint for want of jurisdiction, but had nevertheless made findings as to the merits. In affirming the judgment of dismissal this Court held:

Though the court dismissed the complaint for lack of jurisdiction, it undertook to make findings upon the merits. These findings are without effect.

² In this connection it should be noted that the AFBO rate-fixing agreement, the instrument appellees used to effectuate their combination and conspiracy, was not even submitted to, let alone approved by, the Federal Maritime Commission (J.A. 12).

This succinct holding expresses the universal rule. In *Kansas-Nebraska Nat. Gas. Co. v. City of St. Edward, Nebr.*, 234 F. 2d 436 (8 Cir. 1956) the lower court had dismissed the actions both on their merits and for want of jurisdiction. The Court of Appeals for the Eighth Circuit held (at 441):

Possibly the court had in mind that if in error as to the lack of jurisdiction it would not be necessary to remand the cases for further proceedings, and for that reason proceeded to determine the merits of the actions. As we are of the view that *the court lacked jurisdiction its decision on the merits of the issues should not be permitted to stand*, as these issues are triable in the state court. Having reached the decision that the trial court, because a Federal Court, was without jurisdiction of the subject matter of these actions we pretermitted consideration of the other issues discussed in the briefs of counsel for the respective parties.

The cases are therefore remanded to the trial court with directions to vacate and set aside its findings, conclusions and judgments and to enter in lieu thereof judgments dismissing the actions for lack of jurisdiction. (Emphasis supplied)

See also *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 343 F. 2d 905 (8 Cir. 1965); *Jones v. Brush*, 143 F. 2d 733 (9 Cir. 1944); *Roberts v. Twin Fork Coal Co.*, 223 F. Supp. 752, 755 (E.D. Ky. 1963); *Herzig v. Twentieth Century-Fox Film Corporation*, 129 F. Supp. 845 (S.D. Cal. 1955).

If a court's findings on the merits go for naught when there is no jurisdiction, *a fortiori* an administrative agency which lacks jurisdiction has no power or authority in law to make findings on the merits. As stated in *Utah Const. & Min. Co. v. United States*, 168 Ct. Cl. 522, 339 F. 2d 606, aff'd in part and reversed (on other grounds) in part, 384 U.S. 394 (1966), where the Court of Claims held that

neither the contracting officer nor the head of the contracting agency had jurisdiction to decide a dispute:

If they undertake to do so [i.e., decide despite the want of jurisdiction] * * * neither their decision nor the findings of fact with reference thereto have any binding effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever. (168 Ct. Cl. at 526, 339 F. 2d at 609)

See also *Coleman Bros. Corp. v. City of Franklin*, 58 F. Supp. 551, 554, (D.C. N.H. 1945), *aff'd.* 152 F. 2d 527 (1 Cir. 1945), *cert. denied*, 328 U.S. 844; *Local No. 12 v. N.L.R.B.*, 189 F. 2d 1 (7 Cir. 1951), *cert. denied*, 342 U.S. 868. As stated in *Coleman Bros.*, *supra*, a case which involved an administrative determination, "The want of jurisdiction in any tribunal renders its proceedings void."

The Maritime Commission having found that it had no jurisdiction, its Examiner was without authority to decide and make findings on the merits and his purported findings thereon are without force and effect. Having dismissed the proceeding for want of jurisdiction, the Commission quite properly refused to address itself to the merits.

VI

The Case Should Not, in Any Event, Have Been Disposed Of on the Pleadings

In granting appellees' motions to dismiss, the court below disregarded the admonitions of this Court and of the Supreme Court against summary disposition of complex antitrust litigation.

In *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), the Supreme Court reversed this Court's affirmance of a summary judgment for defendants in a treble damage action, saying (at 473):

We believe that summary procedures should be used sparingly in complex antitrust litigation where motive

and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

See also *United States v. Continental Oil Co.*, 377 U.S. 161 (1964); *The White Motor Co. v. United States*, 372 U.S. 253, 264 (1963).

In *Levin v. Joint Commission On Accreditation Of Hospitals*, 122 U.S. App. D.C. 383, 354 F. 2d 515 (1965), this Court applied the *Poller* doctrine despite its doubt as to the ultimate liability of the defendant even if all the allegations of the complaint were proved. The Court said (at 518):

As to the second point, although the representations made by Doctors Hospital in its affidavits suggest that there may be very substantial questions as to its ultimate liability, we must be mindful of the Supreme Court's strictures upon "trial by affidavit" in antitrust litigation, and its admonition that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S. Ct. 468, 491, 7 L. Ed. 2d 458 (1962). . . . *Doctors Hospital's role, if any, in any consensual conduct which might eventually be established appears to have been, even on appellants' allegations, a peculiarly passive one, dictated perhaps, as it asserts, by the economic and professional necessity of retaining accreditation.* But these are all matters upon which opinions and judgments may be more confidently formed after, rather than before, they have been exposed to the therapy of the direct hearing, with its live testimony and cross-examination. (Emphasis added)

The following decisions are in accord: *Semaan v. Mumford*, 118 U.S. App. D.C. 282, 335 F. 2d 704 (1964); *Frey v. Frankel*, 361 F. 2d 437, 442 (10 Cir. 1966); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F. 2d 414, 420 (4 Cir. 1966); *Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n.*, 358 F. 2d 115, 117 (9

Cir. 1966); *Guidry v. Continental Oil Co.*, 350 F. 2d 342 (5 Cir. 1965); *Allied Mutual Insurance Co. v. Lysne*, 324 F. 2d 290, 293 (8 Cir. 1963).

The relationship of the Far East interport trade to the overall activities of the parties, the extent of AID involvement and control and the impact of appellees' activities on the United States and its foreign commerce may also have a bearing on the question of the court's jurisdiction. If summary procedures are inappropriate in cases like *Poller* and *Levin*, appellants submit that they are even less appropriate to the disposition of basic jurisdictional questions under the Commerce Clause and the Sherman Act.

CONCLUSION

For the foregoing reasons, the court below erred in dismissing the complaint, and the judgment below should be reversed.

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APPENDIX**Statutes and Regulations Involved**

Article I, Section 8, Clause 3 of the Constitution of the United States:

The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Act of July 2, 1890, c. 647, § 1, 26 Stat. 209, 15 USC § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 USC § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 3, 26 Stat. 209, 15 USC § 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory and another, or between any

such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of October 15, 1914, c. 323 § 4, 38 Stat. 731, 15 USC § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Act of June 29, 1936, c. 858, § 901(b), 49 Stat. 2015, 46 USC § 1241(b):

(b) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and rea-

sonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: Provided, That the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of this subsection and so notifies the appropriate agency or agencies: And provided further, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing in this subsection shall repeal or otherwise modify the provisions of section 616a of Title 15.

AID Regulation 1, Section 201.6(N), 22 C.F.R. § 201.6(N):

(N) U.S. flag vessel shipping requirement—

(1) Scope of cooperating country responsibility. The cooperating country will ensure that at least 50 percent of the gross tonnage of all ICA-financed commodities transported to it on ocean vessels during each U. S. fiscal year as well as each quarterly period thereof is transported on privately-owned U. S. flag commercial vessels. The foregoing requirement applies separately for dry bulk carrier shipments, dry cargo liner shipments (i) from the U.S.; (ii) from Europe and Africa; (iii) from the area of the Near East and South Asia; (iv) from Latin America and Canada; and (v) from the area of the Far East. If the foregoing requirement is not met with respect to shipments made during any fiscal year or quarter thereof, the cooperating country will pay promptly to the Director upon demand whatever amount, reimbursed by ICA for commodities, marine insurance, and transportation in shipments directed to the cooperating country during that period of time, as the Director in his discretion shall consider necessary to effect a compliance by the cooperating country with the foregoing requirement for that period of time.

(2) Non-availability of U. S. flag vessels. Any co-operating country may at any time apply to the Office

of Transportation, ICA, Washington, D. C., for an administrative determination with respect to any proposed shipment that no privately-owned U. S. flag commercial vessel is available for such shipment at fair and reasonable rates for such a vessel. In the event that the Office of Transportation shall make such a determination of non-availability, it will advise the cooperating country thereof. Tonnage involved in any or all shipments included in the determination of non-availability of U. S. flag vessels may or may not be excluded from the total tonnage of the fiscal year and the relevant quarter thereof for at least 50 percent of which the cooperating country must ensure transportation on U. S. flag vessels. The determination concerning such exclusion shall be made by the Office of Transportation after a review of all pertinent factors relating to all ICA-financed shipments to the cooperating country during the relevant fiscal year and quarterly period, and the cooperating country shall be advised thereof by the Office of Transportation.

Pub. Law 87-195, Pt. I, § 102, Sept. 4, 1961, 75 Stat. 424, 22 USC § 2151:

It is the sense of the Congress that peace depends on wider recognition of the dignity and interdependence of men, and survival of free institutions in the United States can best be asserted in a world-wide atmosphere of freedom.

To this end, the United States has in the past provided assistance to help strengthen the forces of freedom by aiding peoples of less developed friendly countries of the world to develop their resources and improve their living standards, to realize their aspirations for justice, education, dignity, and respect as individual human beings, and to establish responsible governments.

The Congress declares it to be a primary necessity, opportunity, and responsibility of the United States, and consistent with its traditions and ideals, to renew the spirit which lay behind these past efforts, and to help make a historic demonstration that economic

growth and political democracy can go hand in hand to the end that an enlarged community of free, stable, and self-reliant countries can reduce world tensions and insecurity.

It is the policy of the United States to strengthen friendly foreign countries by encouraging the development of their free economic institutions and productive capabilities, and by minimizing or eliminating barriers to the flow of private investment capital.

• • • • •

Also, the Congress reaffirms its conviction that the peace of the world and the security of the United States are endangered so long as international communism continues to attempt to bring under Communist domination peoples now free and independent and to keep under domination peoples once free but now subject to such domination. It is, therefore, the policy of the United States to continue to make available to other free countries and peoples, upon request, assistance of such nature and in such amounts as the United States deems advisable and as may be effectively used by free countries and peoples to help them maintain their freedom. Assistance shall be based upon sound plans and programs; be directed toward the social as well as economic aspects of economic development; be responsive to the efforts of the recipient countries to mobilize their own resources and help themselves; be cognizant of the external and internal pressures which hamper their growth; and shall emphasize long-range development assistance as the primary instrument of such growth.

• • • • •

It is the sense of the Congress that assistance authorized by this chapter should be extended to or withheld from the government of South Vietnam, in the discretion of the President, to further the objectives of victory in the war against communism and the return to their homeland of Americans involved in that struggle.

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BRIEF FOR APPELLEE FARRELL LINES, INC.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21173

PACIFIC SEAFARERS, INC., ET AL., *Appellants*,

v.

PACIFIC FAR EAST LINES, INC., ET AL.,
Appellees.

Appeal From Order and Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals

for the District of Columbia

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STATEMENT OF QUESTION PRESENTED

In a Complaint for Damages Under the Antitrust Laws plaintiffs-appellants—several shipping lines and their managing agency—have charged defendants-appellees with conspiring to eliminate two of plaintiffs-appellants, Pacific Seafarers, Inc. (PSI) and Seafarers, Inc. (Seafarers) from the business of carrying cargo between Thailand and Taiwan, on the one hand, and South Vietnam, on the other. Defendants-appellees are a group of shipping lines which competed with PSI and Seafarers in the Thailand/Taiwan-South Vietnam trade, two shipping conferences in one or the other of which each of such lines was a member, and a group of shipping lines, of which defendant-appellee Farrell Lines, Inc. was one, which did not participate in the Thailand/Taiwan-South Vietnam trade and as to which the allegations of the complaint indicated involvement in the alleged conspiracy solely by virtue of their also being members of one or the other of defendant-appellee shipping conferences. More than three years prior to institution of the present action, the identical facts set forth in the complaint herein were the subject of a complaint instituted by plaintiff-appellant PSI against defendants-appellees before the Federal Maritime Commission charging defendants-appellees with violations of the Shipping Act of 1916. After a full evidentiary hearing, the Commission dismissed the complaint on the ground that the conduct of which PSI was complaining involved trade wholly between foreign ports and that accordingly the Commission had no jurisdiction over the matter.

In the view of defendant-appellee Farrell Lines, Inc., the only question presented is whether the complaint in this action alleges a restraint upon commerce between the United States and foreign nations so as to state a claim for relief under the United States Antitrust laws, particularly when such complaint is considered in conjunction with the findings of the Maritime Commission in the prior proceeding.



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21173

PACIFIC SEAFARERS, INC., ET AL., *Appellants*,

v.

PACIFIC FAR EAST LINES, INC., ET AL.,
Appellees.

**Appeal From Order and Judgment of the United States
District Court for the District of Columbia**

BRIEF FOR APPELLEE FARRELL LINES, INC.

COUNTERSTATEMENT OF THE CASE

In this case several shipping lines and their managing agency charge a number of other shipping lines and two shipping conferences with having conspired with each other to eliminate plaintiffs-appellants Pacific Seafarers, Inc. (PSI) and Seafarers, Inc. (Seafarers) from the Far East interport trade between Thailand-Taiwan and South Vietnam in order to monopolize such trade for the group of defendant-appellee lines which operated in such trade, in alleged violation of sections 1, 2 and 3 of the Sherman

Anti-Trust Act, 15 U.S.C. §§1, 2, 3. The Far East interport trade is described in the complaint as the transportation of cargo picked up at one Far East port and delivered to another. (J.A. 11).

The complaint alleges that for some time prior to 1962 certain of the defendants-appellees, not including defendant-appellee Farrell Lines, Inc. (Farrell), have carried substantial amounts of cargo from one Far East port to another Far East port, as well as cargo from United States ports to Far East ports. The vessels used by defendants-appellees in the Far East interport trade allegedly begin and end their voyages in the United States. (J.A. 11-13).

Plaintiffs-appellants allege that the bulk of the funds for procurement and transportation of the commodities carried in the Far East interport trade is provided by the Agency for International Development (AID) of the United States Government. (J.A. 11). These funds are made available to the Government of South Vietnam in the form of loans or grants to finance the purchase of cement, fertilizer and other commodities from Thailand or Taiwan and the transportation of such commodities to South Vietnam. The dollars made available to the Government of South Vietnam by the AID financing are sold to commercial importers in exchange for an equivalent amount of South Vietnamese currency. The importers then use the United States dollars for procurement of the commodities and related shipping services pursuant to normal commercial practices. (J.A. 145-146).

Since May of 1959 those of the defendants-appellees who operate in the Far East interport trade have been parties to an agreement fixing the rates applicable to United States Government-financed shipment of cargo from one Far East port to another. This rate agreement was published under the name of American Flag Berth Operators (AFBO), an association of American flag carriers

operating in the Far East interport trade. (J.A. 12, 114-115). The rate agreement was not submitted to nor approved by the Federal Maritime Commission. (J.A. 12).

In 1962 plaintiffs-appellants PSI and Seafarers entered the Far East interport trade in competition with the defendants-appellees who were members of AFBO. The only trade in which PSI and Seafarers were engaged was the carriage of cargoes picked up in Thailand and/or Taiwan and delivered in South Vietnam, and neither carrier ever carried any cargo to or from the United States. (J.A. 113-114).

The alleged conspiracy to drive PSI and Seafarers out of the Far East interport trade took the form of unsuccessful efforts by certain of the defendants-appellees to persuade government officials in South Vietnam and the United States to establish requirements for eligibility to carry AID-financed cargoes which PSI and Seafarers did not meet and an agreement by the AFBO appellees to restore competition by permitting AFBO members to set Far East interport rates on cement and fertilizer free of the AFBO agreement. (J.A. 13-16). The opening of these rates was allegedly followed by a substantial drop in such rates. PSI and Seafarers were unable to compete successfully at the new rate level and thus were obliged to terminate their operations. (J.A. 16).

In April of 1963 plaintiff-appellee PSI filed a complaint with the Federal Maritime Commission charging that the acts alleged in the present complaint were violative of sections 15, 16 First, and 18 of the Shipping Act of 1916, as amended, 46 U.S.C. §§814, 815, 817. After extensive hearings, the Commission found that:

- (i) "PSI operates a common carrier service with American flag vessels in the Taiwan-Thailand/South

Vietnam trade. It does not offer a service between the United States or any of its Districts or Territories or possessions on the one hand and a foreign country on the other hand." (J.A. 113).

(ii) "[A] PSI affiliate [Seafarers] operates a charter or tramp service in the same trade." (J.A. 114).

(iii) "The cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port." (J.A. 114).

(iv) "The shipping arrangements as well as the sales of the commodities are made between foreign principals. Although the U.S. Government through the Agency for International Development (AID) ultimately finances the sales — including the cost of water transportation — our Government in no way participates in the transactions." (J.A. 114).

(v) "The record is bereft of any evidence that the cement involved was cement transshipped from the United States." (J.A. 114).

(vi) "AFBO purports to establish rates and conditions of carriage by its signatories between Taiwan/Japan and Thailand, Korea, Vietnam, the Philippines, Okinawa and Cambodia. Its memoranda of agreed rates relate solely to commercial cargoes in these foreign interport trades." (J.A. 115).

(vii) "AFBO is an organization of American flag vessels plying a trade totally within the confines of foreign Far Eastern ports." (J.A. 117).

On the basis of these findings, the Commission concluded that "the reach of the [Shipping] Act and, consequently, our jurisdiction, does not extend to the matters complained of" because, *inter alia*, "the AFBO agreement neither directly nor materially affected our foreign commerce." Consequently the complaint was dismissed. (J.A. 113-120). PSI never requested any sort of reconsideration or rehearing of any part of the Commission's decision, as it might have done under section 25 of the Shipping Act, 46 U.S.C. §824, nor did it exercise its statutory right to judicial review of the Commission's order under section 2 of the Administrative Orders Review Act, 5 U.S.C. §1032 (now 28 U.S.C. §2342).

Thereafter plaintiffs-appellants filed the present action, in which they seek treble damages under the antitrust laws for the damage to PSI and Seafarers resulting from termination of their operations in the Far East interport trade, as well as the damage allegedly done to the other plaintiffs-appellants due to their alleged financial dependence upon PSI and Seafarers. (J.A. 17).

In addition to the foregoing, plaintiffs-appellants have also alleged in their complaint that all plaintiffs-appellants are American corporations having their principal offices in New York, (J.A. 6-7) and that plaintiffs-appellants PSI and Seafarers operated only American-flag vessels manned by American crews hired in the United States, to which such vessels returned for most repairs that were required. (J.A. 12). Plaintiffs-appellants have also alleged that the carrier defendants-appellees are American corporations engaged in the ocean shipping business and that the other two defendants-appellees are unincorporated shipping conferences in one or the other of which each of the carrier defendants-appellees is a member. (J.A. 7-11). The carrier defendants-appellees are all allegedly common carriers by water engaged in the transportation

of property to and from various ports in the United States and ports in other countries. These defendants-appellees allegedly employ American crews hired in the United States, and provision and repair their vessels "primarily" in the United States. (J.A. 11).

Defendant-appellee Farrell, a carrier defendant-appellee which did not participate in the Far East inter-port trade and was not a party to the AFBO rate agreement, filed a motion to dismiss for failure to state a claim (J.A. 2, 19) and a motion for summary judgment (J.A. 157)¹, and the other defendants-appellees filed a variety of motions and other pleadings. (J.A. 2-3). By stipulation of the parties, and with the approval of the Court, it was agreed that the motions seeking dismissal of the complaint, or summary judgment thereon, "based on lack of jurisdiction over the subject matter", which included Farrell's motion to dismiss for failure to state a claim (except for the portion of such motion challenging the standing of certain plaintiffs), should be heard first. (J.A. 153-158).

After oral argument on those motions on June 2, 1967, the Court ruled from the bench that the motions to dismiss would be granted, stating:

"I am of the opinion that the complaint does not state facts constituting a cause of action under the Sherman Antitrust Act and, therefore, the Court is without jurisdiction and the motions to dismiss will be granted." (J.A. 167).

On June 9, 1967, an order was entered dismissing the complaint in its entirety on the ground that the Court was

¹ The granting of Farrell's motion to dismiss made it unnecessary for the District Court to rule on Farrell's summary-judgment motion. (J.A. 168). Hence, the latter motion is not involved in this appeal and is not printed in the Joint Appendix.

without jurisdiction over the subject matter of the complaint. This order recited that such determination made it unnecessary to consider any other motions pending in the matter. (J.A. 167-168). This appeal followed. (J.A. 169).

STATUTES AND REGULATIONS INVOLVED

Relevant parts of the statutes and regulations involved which are not included in the brief of appellants are set forth in the Appendix hereto.

SUMMARY OF ARGUMENT

To state a claim for relief under the Sherman Act, a plaintiff must allege facts showing that defendants' allegedly illegal conduct directly and materially restrained trade or commerce "among the several States, or with foreign nations." Where, as in the present case, an anti-trust plaintiff purports to allege a restraint on United States commerce "with foreign nations", the facts alleged must show the required restraint upon commerce between the United States and a foreign nation, and allegations showing only a restraint upon commerce between one foreign nation and another do not meet the statutory requirement.

The present complaint alleges in great factual detail only a restraint on commerce between Thailand/Taiwan, on the one hand, and South Vietnam, on the other, and sets forth no allegations showing any restraint of United States commerce with any foreign nation. Appellants clearly allege that the sole object and direct effect of the alleged conspiracy was to eliminate appellants PSI and Seafarers from the business of transporting commercial cargoes from Thailand and Taiwan to South Vietnam,

the only business in which PSI and Seafarers were engaged.

The principles established in the leading case of *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), regarding application of the jurisdictional requirements of the Sherman Act to transportation services clearly establish that appellants' allegations of restraint on transportation between one foreign port and another do not show a restraint on United States foreign commerce within the meaning of the Sherman Act. *Yellow Cab* establishes that in evaluating whether a restraint on transportation services effects a restraint on interstate or, by analogy, foreign commerce, the determinative factor is where, in terms of the transportation contract or arrangement, the journey begins and where it ends. In the transportation involved here, the pertinent journeys were entirely between one foreign port and another so that no restraint of commerce between the United States and a foreign nation was involved.

The principle of the *Yellow Cab* case applies *a fortiori* to cases which involve a purported restraint on United States foreign commerce, such as the present case. Whereas courts may justifiably apply liberal jurisdictional standards in interstate commerce cases, which involve a single domestic market, considerations of international comity dictate a far more cautious approach in weighing the sufficiency of allegations of restraint of United States foreign commerce. Courts have recognized that an overzealousness to apply United States law extraterritorially can provoke severe diplomatic disruptions and troublesome conflicts of jurisdiction and, accordingly, they have consistently throughout the 77-year old life of the Sherman Act applied the Act only to cases involving a restraint upon the commercial movement of goods or persons between the United States and a foreign nation.

In the field of ocean shipping in particular, Congress has always been extremely careful to recognize the propriety of limiting its regulation thereof to exclude regulation of shipping between one foreign port and another. This is explicitly recognized in the jurisdictional limitations of the Shipping Act of 1916, and the policy and provisions of that Act make clear that Congress has regarded Sherman Act jurisdiction over ocean shipping as similarly limited. The power of the Maritime Commission under the Shipping Act to exempt shipping conference agreements from the antitrust laws is limited to conference agreements regarding service between a United States port and a foreign port — a limitation that makes sense only on the assumption that Congress regarded United States regulation of foreign-to-foreign shipping as inappropriate under either the Shipping Act or the Sherman Act. After all, the advantages of shipping conferences, and of participation therein by United States-flag vessels, are as great in the one case as in the other and there is no indication that Congress thought otherwise. Furthermore, section 14a of the Shipping Act, which denies access to United States ports to foreign-flag carriers which belong to a foreign interport shipping conference which engages in certain trade practices and which excludes United States-flag carriers from membership therein, demonstrates that Congress intended that United States-flag carriers should participate in foreign interport shipping conferences. Since such conferences are not within the antitrust exemption power of section 15 of the Shipping Act, participation therein would clearly violate the Sherman Act if it were applicable. Thus, to give effect to section 14a of the Shipping Act, which was enacted thirty years after enactment of the Sherman Act, the Sherman Act must be construed as applicable only to the activities

of shipping conferences in trade between a United States and a foreign port.

Strong additional support to the District Court's dismissal of the complaint is provided by the ruling of the Federal Maritime Commission in the PSI proceeding that "the AFBO agreement neither directly nor materially affected [United States] foreign commerce." Under well-established principles of primary jurisdiction, the subject matter of appellants' complaint was required to be submitted to the Commission, prior to judicial action thereon, for its expert evaluation of the pertinent factual and policy problems. In cases, such as this, which involve a ruling of an agency administering a pervasive regulatory scheme, courts have held that the rationale of the primary-jurisdiction doctrine requires that the agency determination be binding in a subsequent court action involving the same subject matter. This is true of both an agency's determinations on substantive matters as well as its determinations regarding matters of its jurisdiction. All rulings of the Maritime Commission in the PSI proceeding were necessary to determination of the jurisdictional question, were made after extensive hearings and full opportunity for litigation by all parties, and were never appealed by PSI. Thus, the ruling that "the AFBO agreement neither directly nor materially affected [United States] foreign commerce" is entitled to nearly conclusive weight, at the very least, in this proceeding, and such ruling compels a conclusion that the alleged conspiracy did not effect a restraint on United States foreign commerce.

The theories of Sherman Act jurisdiction to which appellants have been driven are wholly untenable and unsupported by precedent.

Appellants' argument that "the Sherman Act follows the Constitution" and that as to ships and shipping "the Constitution follows the flag" is wholly misplaced. Ap-

plication of the law of the flag in maritime matters is confined to matters of discipline and other things done on board ship which affect *only* the vessel or its personnel. A Sherman Act conspiracy clearly is not such a matter and, indeed, appellants have not even alleged any overt acts of conspiracy occurring on board any of appellees' vessels and have not alleged — and could not allege — that the supposed conspiracy affected only the vessels involved.

Appellants' argument that the Sherman Act is applicable to the alleged conspiracy because appellants and/or appellees were engaged in United States foreign commerce is wholly devoid of substance. The factual allegations of the complaint do not support appellants' claim that they were engaged in such commerce, for there is no allegation that they performed transportation services anywhere than in the Thailand/Taiwan-South Vietnam inter-port trade. In any event, the authorities are clear that the test of Sherman Act jurisdiction is not whether the alleged conspirators and/or their alleged victims are engaged in interstate or United States foreign commerce but whether the alleged conspiracy directly and materially affected such commerce in the relevant market involved. None of the cases cited by appellants holds the contrary.

Similarly devoid of substance is appellants' argument that the Sherman Act is applicable to the conspiracy alleged because it had an "impact" within the United States and had "a real and substantial relation to the [United States] national interest." Creation of the supposed "impact" and "national interest" tests by appellants is the result of careless reading of the pertinent Supreme Court decisions. In any event, no court has held — and this court should not hold — that the incidental impacts in the United States cited by appellants such as termination of employment contracts and cancellation of telephone serv-

ice are sufficient to bring an alleged conspiracy in a wholly foreign market within the jurisdiction of the Sherman Act. And there is no substance to appellants' assertion that the United States, through AID, paid for the Far East interport transportation services involved so that the AFBO conspiracy sufficiently affected the United States national interest to bring the conspiracy within the jurisdiction of the Sherman Act. The undisputed materials of record here establish that AID merely financed ordinary commercial transactions between foreign principals and that the Government of South Vietnam was obligated to repay the funds to AID. Recent authorities hold that financing by AID of ordinary commercial transactions is irrelevant to questions of application of the Sherman Act or the Shipping Act to such transactions.

Finally, there is no need or justification for this Court to postpone until after trial a decision on the single jurisdictional issue raised here — whether appellants have alleged facts showing a restraint on United States foreign commerce so as to bring the alleged conspiracy within the jurisdiction of the Sherman Act. All the pertinent facts are set forth in the complaint, in supplemental materials filed herein and in the findings of fact of the Maritime Commission. Those findings of the Commission are, under principles of collateral estoppel, binding upon appellants and, in any event, appellants' complaint contains no allegations of fact which take issue with any of such findings. The crux of the matter is simply that there is no dispute between the parties as to the essential jurisdictional facts but only a dispute regarding the question of law as to application of the jurisdictional standard of the Sherman Act to those facts. Thus, the District Court properly concluded that no trial was necessary to establish that appellants have not alleged — and could not al-

lege — that the conspiracy of which they complain effected a direct and material restraint upon commerce between the United States and foreign nations so as to state a claim for relief under the Sherman Act.

ARGUMENT

Introduction

The question presented by this appeal is every bit as simple as District Judge McGarragh, ruling from the bench after oral argument, obviously found it to be. The essence of the matter is that elimination of the transportation services of two water carriers who performed such services entirely between foreign ports and who carried no goods or passengers either coming from or destined for the United States could not conceivably effect a restraint on the foreign commerce of the United States. All of appellants' talk about broad constitutional principles and the importance of the United States foreign aid program to South Vietnam cannot obscure this essential fact — and cannot magically convert transportation of cargo between one foreign port and another into movement of goods or persons between a foreign port and the United States. In the 77 years since its passage, the Sherman Act has never been applied to a foreign-commerce case in which no such movement was involved.

I. The Complaint Does Not Set Forth a Claim For Relief Under the Sherman Act Because It Does Not Allege a Restraint on the Interstate or Foreign Commerce of the United States.

A. *The Complaint Alleges Only A Restraint On Sea Transportation Between Thailand/Taiwan And South Vietnam And Such Restraint Is Not A Restraint On The Interstate Or Foreign Commerce Of The United States.*

To state a claim for treble-damages under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7, a plaintiff must allege facts which show, *inter alia*, that the challenged conduct of defendants was "in restraint of trade or commerce among the several States, or with foreign nations". 15 U.S.C. § 1. In the absence of factual allegations of such a restraint, an antitrust complaint must be dismissed for failure to state a claim upon which relief can be granted. *E. g., United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964).

The required allegations of a restraint of interstate or United States foreign commerce must set forth facts showing direct and material effects upon such commerce. *E. g., United States v. Yellow Cab Co.*, 332 U.S. at 230-31; *Page v. Work*, 290 F. 2d 323 (9th Cir.), cert. den., 368 U.S. 875 (1961); *Elizabeth Hospital, Inc. v. Richardson*, 269 F. 2d 167 (8th Cir.), cert. den., 361 U.S. 884 (1959); *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F. 2d 125 (10th Cir. 1952); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d 99 (2d Cir. 1951); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 443 (2d Cir. 1945). As the District Court said in *United States v.*

Aluminum Co. of America, 44 F. Supp. 97, 246 (S.D.N.Y. 1941), “[W]hat does not directly and materially affect the commerce of the United States is excluded from regulation by the Sherman Act”. The point was reiterated strongly in *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d at 105-106, where the court held that what “was meant to have, and did have, at most, only an incidental, peripheral, reference to sales in the United States of America” is outside the reach of the Sherman Act. In *Page v. Work*, 290 F. 2d at 332, the Court of Appeals for the Ninth Circuit made the same point in these words:

“However, despite the increased thrust of federal commerce power as business interests become more interrelated and complex, the courts have consistently required that in order for federal antitrust jurisdiction to be sustained the effect on interstate commerce of an alleged antitrust violation in a local area must be direct and substantial, and not merely inconsequential, remote or fortuitous.”

There is no question that where, as in the present case, a plaintiff attempts to allege a restraint on trade or commerce “with foreign nations” the allegations of illegal restraint must show direct and material effects upon commerce *between* the United States and another country. As Chief Justice Marshall made clear in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824), the constitutional power of Congress over the foreign commerce of the United States extends only to “commercial intercourse *between* the United States *and* foreign nations.” (emphasis added).

Here appellants have failed utterly to allege facts showing that the alleged conspiracy restrained commerce between the United States and any foreign nation. Indeed, the facts alleged by appellants negate the possibility of

any such restraint. The complaint alleges in unmistakable terms that the sole object and effect of the alleged conspiracy was to exclude appellants PSI and Seafarers from the business of picking up cargoes in Thailand and Taiwan and transporting them to South Vietnam. There is no allegation that either PSI or Seafarers ever carried any cargo or passengers to or from any United States port or participated in any trade other than that between Thailand/Taiwan and South Vietnam. Hence, elimination of PSI and Seafarers from the Thailand/Taiwan-South Vietnam trade manifestly did not result in any restraint upon transportation of persons or property between the United States and any foreign nation and thus did not restrain United States foreign commerce.

The principles established in the Supreme Court's decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), make clear that transportation of persons or property between one foreign port and another is not part of United States foreign commerce and thus not subject to the Sherman Act. In the *Yellow Cab* case, which involved the analogous question as to the sufficiency of allegations of restraint on interstate commerce, the Supreme Court dismissed the portion of a Sherman Act complaint which alleged that defendants had conspired to exclude competitors from engaging in the transportation by local taxicab of interstate railroad passengers between their homes or hotels in Chicago and the Chicago railroad stations, on the ground that "such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act." 332 U.S. at 230. In holding that a restraint of such transportation is beyond the jurisdiction of the Sherman Act the Court thus made clear that in appraising the jurisdictional sufficiency of Sherman Act allegations of an alleged restraint with respect to transportation services, the determinative factor is where,

in terms of the transportation contract or arrangement, the journey begins and where the journey ends in the particular transportation trade involved. In *Yellow Cab*, the local taxicab journeys began in Chicago and ended in Chicago so the Court regarded the commerce restrained as intrastate, even though the passengers moved on into, or were moving from, interstate journeys by rail.² In the present case, the journeys of the cargoes involved began in Thailand or Taiwan and ended in South Vietnam, so the commerce restrained was clearly foreign-to-foreign commerce. Thus the principle on which the restraint in *Yellow Cab* was excluded from Sherman Act jurisdiction also excludes the alleged restraint in the present case from Sherman Act jurisdiction. Indeed, the alleged restraint on the foreign-to-foreign transportation in the present case is more clearly beyond the jurisdictional perimeter of the Sherman Act than even the restraint on the intrastate transportation in *Yellow Cab*, since in this case there are lacking even the *Yellow Cab* allegations that the property or persons being transported had been, or were to be, transported in interstate or United States foreign commerce by another transportation medium.

The limitation on Sherman Act jurisdiction over interstate commerce established by the *Yellow Cab* decision applies *a fortiori* to Sherman Act jurisdiction over United

² In the portion of the *Yellow Cab* case which involved local taxicab service between Chicago homes or hotels and Chicago railroad stations, the taxicab transportation was wholly independent, in terms of the transportation arrangement and payment of fare, from the railroad transportation. In another portion of the same case which involved taxicab transportation of interstate rail passengers between one Chicago railroad station and another, the inter-station taxicab service was performed pursuant to contractual arrangements between the taxicab company, the railroads, and the passengers. Hence that particular taxicab transportation was contractually part of the interstate journey, and thus was held to be a part of the stream of interstate commerce, within the meaning of the Sherman Act. *United States v. Yellow Cab Co.*, 332 U.S. at 228-229.

States foreign commerce. Although the policy considerations relevant to complaints alleging restraints on interstate commerce may urge the courts to err on the side of jurisdictional authority to reach any conduct which might conceivably be a clog in a single free domestic United States market, considerations of international comity dictate a far more cautious approach with respect to complaints, such as the present one, purporting to allege restraints on United States commerce with foreign nations. As to such cases, a far-reaching application of the Sherman Act such as that suggested by appellants here might well lead to severe diplomatic disruptions and troublesome conflicts of jurisdiction. Judge Learned Hand recognized this and defined its implications for judicial construction of the Sherman Act in his landmark decision in *United States v. Aluminum Co. of America*, 148 F. 2d 416, 443 (2d Cir. 1945) :

“There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.”

Such international complications, resulting from attempts to apply the Sherman Act and other legislation even to United States exports and imports, which are clearly part of United States foreign commerce, have not been infrequent in recent years. For instance, in *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951); 105 F. Supp. 215 (S.D.N.Y. 1952)

(supplemental opinion), a United States district court rendered judgment for the plaintiff in a Sherman Act case involving the allocation of world trading regions for nylon by means of a patent pooling agreement between ICI (a British Corporation) and E.I. dePont de Nemours and Company. The court decreed that ICI refrain from exercising its rights under its English nylon patents to prevent importation into England of the patented products for resale, and ordered ICI to license the patents to all persons desiring them. Subsequently an English court, in a suit brought by ICI's exclusive patent licensee, ordered specific performance of the licensing agreement, thereby effectively nullifying the American decree. *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] 1 Ch. 19 (C.A. 1952) (interlocutory appeal); [1954] 3 Weekly L.R. 505 (Ch.) (final appeal). More recently, in an area related to the present litigation, the United States Federal Maritime Commission attempted to strengthen and broaden its regulation of foreign-flag ocean liners operating between United States ports and foreign ports, by ordering that such carriers produce documents located abroad relating to rates. See discussion in *Montship Lines, Ltd. v. Federal Maritime Board*, 111 U.S. App. D.C. 160, 295 F. 2d 147, 153-54 (D.C. Cir. 1961). Several countries retaliated by enacting new statutes forbidding such countries' domestic corporations from producing the documents, on pain of fine and imprisonment. See, e.g., Shipping Contracts and Commercial Documents Act, 1964, 12 & 13 Eliz. 2, c. 87; 698 House of Commons Debates 1215 (1963-64). The United States finally had to go to the Organization for Economic Cooperation and Development to arrange, on a diplomatic level, for the production of such documents. Even then the arrangement was inadequate, and it was conditioned on an undertaking by the United States not to enforce pending court orders for the pro-

duction of documents, and not to use the documents obtained by diplomacy as the basis of criminal prosecutions or fines against shipowners or conferencees. Agreed Minute providing for the exchange of Shipping information, 52 Dep't. State Bull. 188-90 (1965), especially §§ 5 and 8.

That such disputes and complications can arise even out of United States attempts to regulate its export-import trade makes it all the more imperative that the courts recognize that Congress did not intend the Sherman Act to cover restraints so far removed from United States export-import trade as that on foreign-to-foreign sea transportation alleged in this case. This alleged restraint on supply in a foreign market is precisely the kind of restraint to which Judge Learned Hand was referring when he wisely pointed out that, even where such restraints in a foreign market "may have repercussions in the United States. . . it is safe to assume that Congress certainly did not intend the Act to cover them." *United States v. Aluminum Co. of America*, 148 F. 2d at 443.

All Sherman Act decisions involving allegations of restraint of United States foreign commerce are fully in accord with this counsel of caution against jurisdictional overreaching. For instance, in *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d 99, 105 (2d Cir. 1951), the Second Circuit held that a price-fixing agreement did not violate the Sherman Act because it "was explicitly confined to Great Britain and Ireland, and did not affect sales in the United States." And in every other foreign-commerce case, including all such cases cited by appellants, the court has found the Sherman Act to be applicable only where an object and a direct and material effect of defendant's conduct was to restrict the commercial movement of goods or persons between the United States and a foreign nation. For example, in *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), cited by appellants, the Supreme Court found

sufficient to state a claim an antitrust complaint charging defendants with conspiracy to control the sisal market, pursuant to which the conspirators engaged in numerous acts in Mexico and Yucatan. The Court pinned its decision squarely on the finding that "the fundamental object [of the conspiracy] was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. . . . [B]y their own deliberate acts, here and elsewhere, [the defendants] brought about forbidden results within the United States." (274 U.S. at 276). And in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), on which appellants rely heavily, the Supreme Court held that an antitrust plaintiff based in the United States was entitled to submit evidence of activities of defendants in Canada which allegedly violated the Sherman Act by excluding the plaintiff from selling vanadium to customers in Canada. Thus *Continental Ore* also involved allegations of a direct restraint upon the sale of goods from United States sources to Canadian customers and hence a restriction upon the movement of goods from the United States to Canada.

During the 77 years the Sherman Act has been on the books, no court has ever applied the Act to a conspiracy involving transportation of goods or passengers wholly between one foreign nation and another, as appellants are asking this court to do. This case is utterly unlike *Thomsen v. Cayser*, 243 U.S. 66 (1917), or *United States v. Pacific & A.R. & Nav. Co.*, 228 U.S. 87 (1913), cited in appellants' brief. The former involved a restraint on the carriage of freight between the United States and South Africa and the latter involved a conspiracy between common carriers involved in transporting goods and passengers between the United States and Alaska via Canada. *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (D.C.D.C. 1960), cited by appellants, is also inapposite.

That case did not involve any question of the requisite allegations of a restraint on United States foreign commerce to support an antitrust complaint. There the court held, in effect, that a grand jury's jurisdiction to *investigate possible violations of the Sherman Act* is wider than a court's jurisdiction to *convict or to award damages for actual violations.* (186 F. Supp. at 304-05). Specifically the court held only that a federal grand jury had jurisdiction to investigate the possibility of violation of the federal antitrust laws and other federal statutes and in the course thereof to ascertain whether agreements which on their face related to shipment of cotton from Mexican ports to other foreign ports had a "substantial anti-competitive effect on our foreign commerce." (186 F. Supp. at 314). The possibility of such a substantial effect was raised by Government charges that American-grown cotton was being transshipped to Mexico for shipment abroad out of Mexican ports, although the court did not even go so far as to hold that if this could be established the requisite effect on United States foreign commerce would be shown.³ No antitrust indictment ever arose out of the grand jury investigation of the foreign-to-foreign shipping agreements so the jurisdictional issue raised in the present case — the sufficiency of allegations in a complaint of a restraint on United States foreign commerce resulting from a conspiracy involving only foreign-to-foreign shipping — was never considered by a court.

³ In the present case there is no hint of an allegation that the cargoes carried in the Far East interport trade were transshipped from or to the United States, and the Maritime Commission specifically found that "the record [in the administrative proceeding] is bereft of any evidence that the cement involved was cement transshipped from the United States." (J.A. 114).

B. The Policy And Provisions Of The Shipping Act of 1916, As Amended, Demonstrate That Congress Regarded the Trade Practices of Foreign Interport Shipping Conferences As Beyond The Jurisdiction Of the Sherman Act.

The policy and provisions of the Shipping Act of 1916, as amended, indicate unmistakably that Congress regarded the trade practices of foreign interport shipping conferences, such as AFBO, as beyond the jurisdictional reach of the Sherman Act.

Twenty-six years after passage of the Sherman Act Congress passed the Shipping Act to deal specifically with the problem of regulation of water carriers engaged in the foreign commerce of the United States. This legislation was the outgrowth of extensive investigations of the trade practices of shipping conferences. See *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966).

That the provisions of the Sherman Act and the Shipping Act were to be read together to form a coherent whole is clear from the language of the Shipping Act and the context in which it was enacted. At the time of passage of the Act, although it had "long been almost universal practice for American and foreign steamship lines engaging in ocean commerce to operate under conference agreements and arrangements," "it was recognized that such agreements might run counter to the policy of the antitrust laws...." *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 487 (1958). To preserve the shipping conferences against possible antitrust attacks Congress, in section 15 of the Shipping Act, 46 U.S.C. §814, empowered the Federal Maritime Board, the predecessor of the Federal Maritime Commission, to approve agreements between ocean carriers relating to rates, schedules and other trade practices and thereby exempt such agreements from the reach of the

Sherman Act. Thus, Congress clearly meshed the broad regulatory scheme of the Sherman Act with the specific regulatory scheme of the Shipping Act.

However, the regulatory scheme of the Shipping Act, including the antitrust exemption authority, only extends to shipping between a United States port and a foreign port and not to shipping between one foreign port and another. The Federal Maritime Commission so held in the proceedings in which it disclaimed jurisdiction to apply the Shipping Act to the very matters involved in the present action. In that proceeding, from which appellant PSI never took an appeal, the Commission stated:

“The record in this case makes perfectly clear that the conduct complained of is and has been exercised by carriers in a trade or trades other than between ‘the United States or any of its Districts, Territories or Possessions and a foreign country’, and no matter how offensive or horrendous that conduct, it does not fall within the authority of this Commission.” (J.A. 116).

And the Commission held specifically that the AFBO agreement relating to the Thailand/Taiwan-South Vietnam trade was not “an agreement within the purview of Section 15” because “AFBO is an organization of American flag vessels plying a trade totally within the confines of foreign Far Eastern ports.” (J.A. 117).⁴ Congress’ thinking behind

⁴ The Commission’s holding is clearly in accordance with the precise language of the Act. The purpose of the Act is “to regulate common carriers by water engaged in the foreign and domestic commerce of the United States”, 39 Stat. 728, and a “common carrier by water in foreign commerce” is defined in the Act as “a common carrier. . .engaged in the transportation by water of passengers or property between the United States. . .and a foreign country. . .” (emphasis added). 46 U.S.C. §801. Also, section 14 of the Act, 46 U.S.C. §812, prohibits deferred rebates, “fighting ships” and certain other unfair practices only “in respect to transportation by water of

these jurisdictional limitations was expressed by Senator George Norris, during the discussion of the Shipping Act on the floor of the Senate at the time of its passage, in the statement, which no one questioned, that "we cannot legislate to regulate traffic between one foreign port and another foreign port; that is certainly beyond our jurisdiction . . . We cannot regulate the rates, the rules or other matters in connection with ships passing from one foreign country to another foreign port . . ." 53 Cong. Rec. 12554.

Since Congress did not extend Shipping Act jurisdiction to foreign-to-foreign shipping, it is inconceivable that Congress could have regarded the Sherman Act as applicable thereto. As shown above, the Shipping Act was enacted to preserve, through regulation, shipping conferences which might otherwise have been vulnerable under the antitrust laws. Such conferences were utilized in *both* United States-foreign and foreign-to-foreign trade, and there is nothing in the legislative history of the Shipping Act to indicate that Congress did not regard the shipping conferences, and participation therein by United States-flag vessels, as equally desirable in both cases. Thus, when Congress enacted section 15 of the Shipping Act to preserve shipping conferences from the Sherman Act, it could only have excluded foreign-to-foreign conferences from the scope of such protection because it regarded United States regulation of foreign-to-foreign shipping as inappropriate under either the Shipping Act or the Sherman Act.

That Congress could not have intended the Sherman Act to apply to trade practices of foreign-to-foreign shipping conferences was made inescapably clear by enactment in 1920 of an amendment which became section 14a of the

passengers or property between *a port* of a State, Territory, District or possession of the United States and any other such port or *a port of a foreign country*." (emphasis added).

Shipping Act, 41 Stat. 996, 46 U.S.C. §813. That section empowers the Commissioner of Customs to refuse the right of entry into United States ports to any foreign-flag carrier which is a member of a shipping conference which, "in respect to transportation of passengers or property *between foreign ports*" (emphasis added), involves use of deferred rebates, or any other practice designated in section 14 of the Shipping Act as unfair with respect to shipping between United States and foreign ports (see footnote 4), and which "excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission."⁵ Section 14a clearly contemplates — and intends — that United States water carriers shall be able to participate in foreign-to-foreign shipping conferences; indeed, section 14a is a weapon to force admission of United States carriers to such conferences which engage in practices which are illegal for United States-foreign conferences. But such practices, as well as the very rate-fixing agreements which are the cornerstones of the conference arrangements, would be clear violations of the Sherman Act if such act were applicable. Since Congress did not empower the Maritime Commission to exempt from the Sherman Act the foreign-to-foreign conferences, Congress could not have intended that such conferences were within the purview of the Sherman Act. It is inconceivable that Congress could have intended to provide a weapon in the Shipping Act for United States carriers to participate in agreements which would be illegal under the Sherman Act. Such legislative entrapment would render section 14a meaningless.

⁵ This section does not constitute an exercise of foreign-commerce jurisdiction by the United States to regulate foreign interport traffic but is simply an exercise of the normal power of the sovereign to impose conditions upon the privilege of aliens to enter its territory.

Thus, the Sherman Act must be read as inapplicable to foreign-to-foreign shipping conferences in order to give effect to the later-enacted section 14a of the Shipping Act. Such a reading is dictated by the sound and well-established canon of statutory construction that where two statutes are separate in time, they must be construed "in a manner which gives effect to the latest legislative expression and still leaves an area of effective operation for the earlier expression." *International Union of Elec., Radio and Machinist Workers v. NLRB*, 110 U.S. App. D.C. 91, 289 F. 2d 757, 761 (D.C. Cir. 1960). Only a construction of the Sherman Act which restricts its operation to the United States-foreign shipping conferences — and excludes from its coverage the operations of foreign-to-foreign shipping conferences such as AFBO — can, as shown above, give effect to section 14a of the Shipping Act.

C. The Federal Maritime Commission's Ruling That The AFBO Agreement Neither Directly Nor Materially Affected United States Foreign Commerce Lends Strong Support To A Conclusion That No Such Commerce Was Restrained By The Alleged AFBO Conspiracy.

The ruling of the Federal Maritime Commission in the PSI proceeding that "the AFBO agreement neither directly nor materially affected [United States] foreign commerce" (J.A. 119) strongly supports a holding here that the alleged conspiracy did not restrain United States foreign commerce and was thus beyond the jurisdictional perimeter of the Sherman Act.

Rulings in the Commission's decision are entitled to, at the very least, nearly conclusive weight in the present proceeding. PSI properly first brought its complaint regarding the AFBO activities to the Commission, to which,

in any event, an antitrust court would have referred it, under the doctrine of primary jurisdiction, for initial expert evaluation of the pertinent factual and policy problems. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958); *Far East Conference v. United States*, 342 U.S. 570 (1952); *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932). In such situation, courts have held that the agency's determination should be given conclusive weight in the court proceeding. E.g., *Seatrain Lines v. Pennsylvania R.R.*, 207 F. 2d 255, 260 (3rd Cir. 1953). Otherwise the two objectives of the primary-jurisdiction doctrine — to avoid conflict between agency and court and to bring agency expertise to bear upon issues raised in judicial proceedings — would be defeated. The Supreme Court has indicated unmistakably in at least one decision, *Pan American World Airways v. United States*, 371 U.S. 296 (1963), that where an agency is administering a pervasive regulatory scheme, including power over tariffs, trade practices, and restrictive agreements and arrangements, a decision by such agency on a matter within its realm of expertise is binding on the courts in an antitrust proceeding. In *Pan American* the Court held that the existence of such a pervasive regulatory scheme over air transportation precluded prosecution of a civil antitrust proceeding aimed at dissolution of a restrictive arrangement between defendants regarding allocation of certain air routes, even though the regulatory agency, the Civil Aeronautics Board, had never ruled on the propriety of such arrangement. *A fortiori*, such an antitrust proceeding would have been precluded by a C.A.B. order approving the restrictive arrangement. Like the C.A.B., the Federal Maritime Commission administers a pervasive scheme of regulation which includes power over tariffs, 46 U.S.C. §817, trade practices, 46 U.S.C. §812, and restrictive agreements and arrangements

between carriers, 46 U.S.C. §814. Thus, when the Maritime Commission has actually ruled upon a matter within its jurisdiction, such ruling is entitled to nearly conclusive weight, at the very least, in an antitrust proceeding. The Maritime Commission undoubtedly had jurisdiction to determine its own jurisdiction over PSI's complaint and to make all findings pertinent thereto. *Seatrail Lines v. Pennsylvania R.R.*, 207 F.2d at 259; cf. *United States v. United Mine Workers of America*, 330 U.S. 258, 290 (1947). And a regulatory agency's determinations regarding the scope of its jurisdiction are fully as binding on a court in a subsequent antitrust proceeding as determinations regarding substantive matters within its jurisdiction. As Judge Hastie put it in his opinion in *Seatrail Lines v. Pennsylvania R.R.*, 207 F.2d at 260:

“Whatever restraint the rules of primary jurisdiction may impose upon a court asked to regulate conduct merely of potential concern to an administrative agency, we think that, once the administrative agency has made a decisive ruling defining its interest in the matter, any meaningful judicial recognition of primary administrative jurisdiction must respect the administrative ruling actually made.”

United States v. First City National Bank of Houston, — U.S. —, 18 L. Ed. 2d 151 (1967), cited by appellants, is not to the contrary. In that case the Supreme Court was passing upon the effect to be given in a Clayton Act proceeding to an approval of a bank merger by the Comptroller of the Currency pursuant to the Bank Merger Act of 1966. The language in that decision regarding courts not giving “presumptive weight to a prior agency decision” clearly refers only to such a decision of an official such as

the Comptroller of the Currency who, while having jurisdiction to regulate certain aspects of an industry, does not have the kind of authority to administer a pervasive regulatory scheme granted to the F.M.C. or the C.A.B. The "controlling" importance of this distinction was clearly pointed out in *United States v. Radio Corporation of America*, 358 U.S. 334, 348-350 (1959), on which the Court relied in the *First National City Bank of Houston* decision. (18 L.Ed. 2d at 156). In the *RCA* case the court refused to give conclusive weight in an antitrust proceeding to a decision of the Federal Communications Commission approving an exchange of two television stations. In making this ruling, which preceded the *Pan American* decision, the Court specifically distinguished cases involving common carriers by rail and water on the ground that such carriers are subject to a pervasive regulatory scheme, including rate regulation, whereas television broadcasters are not.

The Maritime Commission's specific ruling, on which its jurisdictional decision was based in part, that the AFBO agreement "neither directly nor materially affected [United States] foreign commerce" should be given nearly conclusive weight, at the very least, in this proceeding.⁶ In the PSI proceeding before the Maritime Commission, it was necessary for the Commission, in order to determine the jurisdictional issue, to consider and pass upon PSI's arguments, based on cases cited by it, that the Commission had jurisdiction over the AFBO agreement because the subject matter of that agreement was "intimately related" to United States foreign commerce and because the AFBO agreement af-

⁶ Although appellant PSI was the only formal complainant in the proceeding before the Maritime Commission, it is clear that all other appellants, as persons in privity with PSI, see (J.A. 7, 17), are equally bound by the Commission's decision. E.g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401-403 (1940).

fected United States foreign commerce directly and materially. The Commission, relying on its expertise and on the full record before it, categorically rejected both arguments and specifically found that "the AFBO agreement neither directly nor materially affected [United States] foreign commerce." (J.A. 119). Such a finding, which was clearly within the jurisdictional issue presented for the Commission's determination and within the area of the commission's expertise, is thus entitled to be given nearly conclusive weight by this Court. PSI never sought rehearing and/or judicial review of the Commission's decision, and appellants have adduced no reasons of substance why this Court should reach a different conclusion than that of the expert agency having primary jurisdiction over the matter.

Since, as shown above at pp. 14-15, the test of Sherman Act jurisdiction in a foreign-commerce case is whether the challenged activity directly and materially affected United States foreign commerce, the Maritime Commission's conclusion that the AFBO agreement regarding the Far East interport trade did not so affect the United States foreign commerce strongly supports the conclusion that the identical AFBO activities alleged here did not restrain United States foreign commerce.

II. Appellants' Several Theories of Sherman Act Jurisdiction Are Wholly Unsupported by Judicial Precedent and Are Manifestly Unsound.

The various theories of Sherman Act jurisdiction to which appellants have been driven are all without judicial precedent and are patently unsound.

A. Appellants' Argument That The Sherman Act Is Applicable To The Conspiracy Alleged Here Because The Ships Utilized By The Alleged Conspirators Were Of United States Registry Is Wholly Specious.

There is no substance whatsoever to appellants' principal argument that in the Sherman Act Congress exercised the full sweep of its constitutional power over United States foreign commerce and that such power extends to the alleged conspiracy to monopolize the Far East inter-port trade because in such trade appellees utilized vessels of United States registry and Congress' constitutional power over such vessels under the commerce clause is unlimited.

Whether regarded as a "constitutional" or "statutory" standard, the Sherman Act prohibition against conspiracies "in restraint of trade or commerce among the several States, or with foreign nations" still requires, as the cases cited at p. 14 above hold, allegations of a direct and material effect upon interstate commerce or United States commerce "with foreign nations". Neither the reach of the Sherman Act, nor of Congress' commerce power, is unlimited. In the face of citation by the plaintiff in the *Yellow Cab* case of the same cases cited by appellants here regarding exercise by Congress in the Sherman Act of the full measure of its constitutional power over interstate commerce, see 91 L.Ed. 2013, the Supreme Court held in *Yellow Cab* that such power did not extend to a conspiracy to monopolize certain transportation services rendered within the confines of a single state even though it was alleged that persons using such services were using them to commence or to terminate an interstate journey by another transportation medium. As shown above at p. 17, transportation between one foreign port and another of cargoes which

have never been part of a journey between a foreign port and the United States is, *a fortiori*, beyond the jurisdictional limit, whether "constitutional" or "statutory", of the Sherman Act.

That the vessels used by appellees in the Far East interport trade were of United States registry furnishes no basis for a contrary conclusion. As the cases cited by appellants show, the principle that "in dealing with ships the law of the flag applies" is restricted to "'matters of discipline and all things done on board which [affect] *only* the vessel or those belonging to her, and [do] not involve the peace or dignity of the [foreign] country, or the tranquility of the port.'". *United States v. Flores*, 289 U.S. 137, 158 (1933) (emphasis added), quoted with approval in *Lauritzen v. Larsen*, 345 U.S. 571, 585-586 (1953). This rule of international law, which relates not to foreign-commerce jurisdiction but to the maritime and admiralty jurisdiction of the United States, see *United States v. Flores*, 289 U.S. at 157, covers only such shipboard matters as crimes committed aboard ship and compensation rights of seamen arising out of work performed aboard ship. Clearly the practices at which the Sherman Act was directed are not of this type. The Sherman Act proscribes only practices which directly and materially affect United States interstate or foreign commerce—practices which, by definition, do *not* "affect *only* the vessel or those belonging to her". Unlike the shipboard murder involved in the *Flores* case, commission of the Sherman Act crimes of conspiracy and monopoly is not confined to shipboard or any other single locus and the Sherman Act crimes radiate effects far beyond the places where overt acts are committed. Thus, whatever the extent of Congress' maritime power to legislate regarding crimes and other matters occurring on board vessels of United States registry, it is perfectly clear that Congress has

not exercised such maritime power in the Sherman Act. This is borne out by appellants' own complaint, in which there are no allegations of any overt acts of conspiracy occurring aboard appellees' vessels and no allegations of any effect of the alleged conspiracy on any of appellees' vessels. On the contrary, the complaint contains only allegations of overt acts occurring in South Vietnam and the United States and effects upon appellants and upon the commerce of Thailand, Taiwan, and South Vietnam. Clearly appellants have not alleged—and could not allege—a Sherman Act violation which constitutes a "matter of discipline" or "thing done on board [ship] which [affects] only the vessel or those belonging to her".

B. Appellants' Argument That The Sherman Act Is Applicable To The Alleged Conspiracy To Monopolize The Far East Interport Trade Because Appellants And/Or Appellees Were Engaged In United States Foreign Commerce Is Without Substance.

Similarly devoid of substance is appellants' argument that the Sherman Act reaches the alleged conspiracy to monopolize the Far East interport trade because appellants and/or appellees were engaged in commerce between the United States and foreign nations.

The two sentences devoted by appellants at pages 19-20 of their brief to their argument that they were engaged in commerce between the United States and foreign nations clearly reveal that even appellants do not take this assertion seriously. The complaint contains not the slightest allegation of service or even regular voyages by appellants' vessels between the United States and the Far East. The Maritime Commission's finding that the operations of PSI and its affiliate (Seafarers) have been

"wholly foreign" (J.A. 113-114, 117) make clear beyond any doubt that appellants were not engaged in commerce between the United States and foreign nations.

In any event, even if both appellants and appellees were engaged in United States foreign commerce, this would not be sufficient to establish Sherman Act jurisdiction over the restraint alleged here on the wholly foreign Far East interport trade. A Sherman Act complaint must allege a restraint of trade in a legally and commercially relevant market. *E.g., International Boxing Club v. United States*, 358 U.S. 242 (1958); *United States v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956). If the jurisdictional requirement of the Act is not met with respect to the restraint in that market, the fact that the alleged conspirators and their alleged victims are engaged in interstate or foreign commerce is irrelevant. As the Ninth Circuit expressed it most succinctly in *Page v. Work*, 290 F.2d 323, 330 (9th Cir.), *cert den.* 368 U.S. 875 (1961):

"In the antitrust field a relevant market may be narrower than the entire business operation of the business under scrutiny. . . . The test of jurisdiction is *not* that the acts complained of affect a business *engaged* in interstate [or foreign] commerce, but that the conduct complained of affects the interstate [or foreign] *commerce of* such business." (emphasis added).

Since a showing that appellants *and* appellees were engaged in United States foreign commerce would be insufficient to establish Sherman Act jurisdiction here, *a fortiori* a showing that only appellees were so engaged would be insufficient for such jurisdiction. The jurisdictional irrelevance of the fact that an antitrust defendant is engaged in interstate or foreign commerce outside of

the relevant market area is made clear by the Supreme Court's decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). There the Court dismissed a charge of conspiracy between the Yellow Cab Company, the Checker Taxi Company, and others to monopolize the taxi business in Chicago, on the ground that no restraint of interstate commerce had been alleged, even though the defendants were engaged in not only the intrastate commerce at which the alleged conspiracy was directed, but also in a substantial amount of interstate commerce. As in *Yellow Cab*, the fact that appellees in this case were engaged in United States foreign commerce in areas other than the Thailand/Taiwan-South Vietnam trade at which the alleged conspiracy was directed is irrelevant to the question whether a restraint of that foreign interport trade constituted a restraint of United States foreign commerce.

None of the cases cited by appellants supports their startling and wholly unsound argument that the mere fact that a defendant is engaged in interstate or foreign commerce furnishes a sufficient jurisdictional basis for a Sherman Act complaint. In *United States v. Frankfort Distilleries*, 324 U.S. 293, 298 (1945), it was quite clear that the conspiracy to fix local retail prices

"concerned itself with the type of contract used in making *interstate* sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts. *Nor did the boycott used merely affect local retail business.* Local purchasing power was the weapon used to force producers *making interstate sales* to fix prices against their will." (emphasis added).

Thus, interstate trade was itself restrained by the local conspiracy which prevented alcoholic beverages from com-

ing into Colorado except at artificially high prices. In *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 (1959), the conspiracy alleged prevented out-of-state suppliers from selling across state lines to a particular retailer, thus restraining, in the words of the Court, "the natural flow of interstate commerce". In *Klor's* the victim was a local merchant but the complaint was upheld, not because the defendants were engaged in some interstate commerce, but because the direct thrust of the conspiracy alleged was to restrain interstate sales to the local merchant. Again, *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), like *Frankfort Distilleries* and *Klor's*, involved an agreement which excluded out-of-state goods from the local market. Such an agreement is an obvious restraint of "imports" across state lines and thus the clearest form of restraint of interstate commerce. In none of these cases did the Court rely, in its finding of Sherman Act jurisdiction, on the fact that the defendants were engaged in interstate commerce.

The other case cited by appellants, *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), involved a charge of violation not of the Sherman Act, but of the Robinson-Patman Act amendment of the Clayton Act. The jurisdictional standards of the two statutes are significantly different. Whereas the Sherman Act applies to combinations or conspiracies only if their effect is to restrain "trade or commerce among the several States, or with foreign nations", the Robinson-Patman Act specifically applies to price discrimination by "any person engaged in [interstate or foreign] commerce", which discrimination occurs "in the course of such commerce" and where either of the sales involved in the discrimination is "in [interstate or foreign] commerce". 15 U.S.C. § 13(a). Significantly, even the Robinson-Patman Act does not require only that a violator be "engaged in commerce",

but requires also that the price discrimination occur "in the course of such commerce". The language from the *Mead's Fine Bread* case quoted at pages 20-21 of appellants' brief simply establishes that these jurisdictional requirements of the Robinson-Patman Act have been met, including the requirement of interstate sales. But that language clearly does not hold that, to establish jurisdiction under either the Robinson-Patman Act or the Sherman Act, it is sufficient to plead and prove only that the defendants are engaged in interstate or foreign commerce.

C. *There Is No Merit To Appellants' Argument That The Alleged Conspiracy Is Within The Jurisdiction Of The Sherman Act Because It Had An "Impact" Within The United States And Had "A Real And Substantial Relation To The [United States] National Interest".*

Appellants' desperate attempt to establish Sherman Act jurisdiction by seizing upon certain incidents of defendants' activities in the Far East interport trade to show some supposed "impact within the United States and upon its foreign trade" or "a real and substantial relation to the [United States] national interest" is patently specious.

Appellants have created the supposed "impact" and "national interest" tests of Sherman Act jurisdiction by snatching from context certain phrases of the Supreme Court.

The first such phrase—"an impact within the United States and upon its foreign trade" (emphasis added)—from the Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706 (1962), is construed and applied by appellants in a manner which is wholly unsupported by the decision in *Continental Ore Co.*, or that in *United States v. Sisal Sales Corp.*, 274 U.S.

268 (1927), to which the phrase referred. It is clear from those decisions that the nature of the "impact" required for Sherman Act jurisdiction is a direct and substantial impact upon movement of goods or persons between the United States and a foreign nation and not, as appellants suggest, any impact within the United States no matter how trivial or remote. In *Continental Ore* and every other foreign-commerce case cited by appellants, the conspiracy or other illegal activities directly and substantially affected United States exports or imports of the product at which the conspiracy was directed. Thus, in *Continental Ore* the conspiracy choked off plaintiff's exports of vanadium from the United States to Canada. In the *Sisal Sales Corp.* case, the "fundamental object [of the conspiracy] was control of both importation [into the United States] and sale of sisal." In *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), which involved a claim under the Lanham Trade-Mark Act, the jurisdiction of the Lanham Act was upheld on the ground that defendant "bought component parts of his wares in the United States, and spurious 'Bulovas' filtered through the Mexican border into this country". (344 U.S. at 286). In *Branch v. Federal Trade Commission*, 141 F.2d 31 (7th Cir. 1944), an unfair-competition case under the Federal Trade Commission Act, the Commission was held to have jurisdiction to prosecute the defendant's unfair practices in sale of correspondence courses in Latin American countries because the "books, the written instructions, and the examination questions are tangible things that can be seen and handled and are objects which pass through the channels of foreign commerce" (141 F.2d at 36) from the United States to Latin America.

The facts of these cases underscore the triviality and remoteness of the "impact" which appellants ask this Court to transmute into the statutory restraint on United

States commerce "with foreign nations." Although appellants point to several insignificant parallels between the facts of *Continental Ore* and the facts here, they ignore the crucial fact of *Continental Ore* which is not present here: the fact that the conspiracy in *Continental Ore* eliminated the Canadian market for vanadium sold by a United States-based plaintiff, thereby restraining sales of the product from the United States to Canada. Unable to find comparable evidence of a restraint on United States foreign commerce in this case, appellants feebly point to the incidental effects on them in the United States of being driven out of the Thailand/Taiwan-South Vietnam sea transportation business. But they have, understandably, been unable to cite a single authority to support their claim that such incidental matters as dismissal of United States employees and cancellation of United States contracts for such things as telephone and heating service, following termination of overseas business activities, constitute a direct and material impact upon the foreign trade of the United States. No court has accepted—and this court should not accept—such an obvious Alice-in-Wonderland argument. It is absolutely inconceivable that Congress could have intended the courts to extend the economic regulatory powers of the United States—powers which can include criminal sanctions—to conduct which effects only a restraint in a wholly foreign market, because a victim of the restraint is forced to cancel telephone service in the United States.

The test of Sherman Act jurisdiction which appellants purport to draw from *Atlanta Motel v. United States*, 379 U.S. 241, 255 (1964)—“whether [defendants’ activities] had ‘a real and substantial relation to the national interest’”—is wholly specious. Appellants have conjured up this supposed test by ignoring at page 27 of their brief key language from the *Atlanta Motel* opinion which

they quote correctly at page 16 of their brief. As that language makes clear, in *Atlanta Motel* the Supreme Court held that the test of the constitutionality of an exercise of power by Congress over interstate commerce under the Commerce Clause is "whether the activity sought to be regulated is 'commerce which concerns more states than one' *and* has a real and substantial relation to the national interest." (emphasis added). Thus the "national interest" criterion is not by itself the test of the constitutionality of exercise by Congress of its power over interstate commerce; the test is the "national interest" criterion *plus* whether the activity is commerce which concerns more states than one. Even if this test devised for interstate commerce is properly applicable to United States foreign commerce—which is highly dubious (see discussion at pp. 17-18 above)—the test would require a showing that the activity involved concerns commerce between the United States and a foreign nation. Thus, in view of appellants' inability to demonstrate that the commerce involved here between Thailand/Taiwan and South Vietnam constituted commerce between the United States and a foreign nation, appellants' lengthy discussion of the supposed "real and substantial . . . national interest" of the United States in the competitive battle between appellants PSI and Seafarers and the AFBO appellees for business in the Thailand/Taiwan-South Vietnam trade is wholly beside the point.

In any event, the AFBO appellees' activities in such trade are not so related to the United States "national interest" as to transform transportation of goods between one foreign nation and another into United States commerce with a foreign nation. The entire premise of appellants' "national interest" argument is that the shipping provided by PSI, Seafarers and the AFBO defendants in the Thailand/Taiwan-South Vietnam trade was "paid for

by the United States government very largely by funds provided by AID." The falsity of this premise is manifest from the findings of the Maritime Commission in the PSI proceeding and from the affidavit of David E. Bell, former Administrator of AID, which was placed in the record here by appellants as Exhibit 2 to Appellants' Memorandum In Opposition To Motions to Dismiss and for Summary Judgment. On the basis of a full record on the matter, the Commission found "that the ocean transportation and the sales were arranged between foreign principals and that neither AID nor any other agency of our Government participated in any of the commercial or shipping transactions. AID's concern began and ended with its role as *financier*." (emphasis added). (J.A. 116) The Bell affidavit fully supports this finding. As Mr. Bell attested, AID simply made dollar financing available on a loan or grant basis to the Government of South Vietnam, which in turn sold the dollars, in exchange for an equivalent amount of South Vietnamese currency, to commercial importers in South Vietnam. According to Mr. Bell, it was these commercial importers, who had purchased the dollars with their own local currency, who actually used the dollars to procure shipping services for commodities purchased by such importers from Thailand and Taiwan for use in the South Vietnamese economy. Thus it was these South Vietnamese importers who were in fact the purchasers of the commodities and related shipping services—and purchasers for their own account and their own commercial needs.

The fact that AID provided the foreign-exchange financing for these purchases did not mean, as appellants mistakenly assert at pages 28-29 of their brief, that "an increase in freight rates or in the price of cement has no effect whatever on the Government of South Vietnam or on the representatives of that country [the commercial im-

porters] who let the contract or made the shipping arrangements" and that "it is the United States Government that pays the bill." The United States Government itself categorically rejected a similar argument in an *amicus curiae* brief filed in *Missouri v. Stupp Brothers Bridge & Iron Co.*, 248 F. Supp. 169 (W.D. Mo. 1965), a treble-damage antitrust action brought by the State of Missouri and the Missouri State Highway Commission against a group of defendants who had allegedly conspired to rig bids and allocate territories in the sale of fabricated structural steel for federally-aided state highways in Missouri. In reply to defendants' contention that the State of Missouri and the Missouri State Highway Commission were not the real parties in interest, the United States stated that:

"it is the position of the United States that, notwithstanding the involvement of federal moneys, plaintiffs are the proper parties in this case to assert the claims for damages allegedly resulting from defendants' conspiracy . . .

"There can be no question that the ultimate purchaser of this steel was the State Highway Commission and not the United States Government, and that the State Highway Commission and not the United States let the contracts, paid its suppliers, and took title to the steel. Thus there can be no doubt that the State agency incurred the alleged increased costs of the steel which resulted from the conspiracy."

(Quoted in 248 F. Supp. at 175-176).

The same is at least equally true of the present case. AID financing on a loan basis is fully repayable in United States dollars by the Government of South Vietnam, see the Foreign Assistance Act of 1961, Pt. I, § 201(b), 75 Stat.

426 (1961), 22 U.S.C. § 2161(b), so that it, and not the United States Government, pays the bill and would suffer any injury resulting from any increase in freight rates or cement prices. AID financing on a so-called "grant" basis obligates the Government of South Vietnam to place the local currency proceeds of sale of the dollars to the commercial importers into a special account which is to be available for use by the Government of the United States in the manner required by it. See Foreign Assistance Act of 1961, Pt. III, § 609(a), 75 Stat. 442, 22 U.S.C. § 2359(a). Thus, even as to "grant"-financed transactions, the Government of South Vietnam would still feel the immediate pinch if there were any rise in freight rates or cement prices because any such rise would increase the amount of South Vietnamese currency tied up in special accounts owned by the United States Government and would diminish the amount of goods and services received by South Vietnam in exchange for the United States dollar financing made available, which is not, after all, unlimited. And in every transaction, whether financed by loan or grant, any increase in freight rates or cement prices would have the most immediate effect upon the South Vietnamese commercial importers who actually purchase the commodities and the related shipping services, since they would have to pay more South Vietnamese local currency to purchase the additional dollars needed as a result of such cost increases. Hence, it is clear beyond any doubt that AID was only the financier of the transactions involved here and that the actual purchasers who would feel the immediate impact if there were any increase in freight rates were the Government of South Vietnam and the commercial importers of that country.

This conclusion is fully supported by the recent decision in *United States v. Concentrated Phosphate Export Ass'n.*, TRADE REG. REP. (1967 Trade Cas.) ¶ 72,203 (S.D.

N.Y. Sept. 11, 1967), the only Sherman Act case in which the role of AID in purchases financed by it has been analyzed. In that case the court held that alleged price-fixing and business allocation activities of five fertilizer producers, in connection with sales of fertilizer under the United States foreign aid program, which fertilizer was destined for the Republic of Korea, were exempt from section 1 of the Sherman Act as export-trade association activities under section 2 of the Webb-Pomerene Act, 40 Stat. 517, 15 U.S.C. § 62. In so holding, the court, after an exhaustive analysis of the policy and mechanics of the United States foreign aid program, found that even though AID had financed the sales by loan or "grant", the transactions were not domestic sales to the United States Government but were export sales to the Korean Government. The court made clear that regardless of whether a transaction is financed by AID on a "loan" or "grant" basis, the recipient foreign government is obligated to make repayment to the United States Government in United States dollars or in deposits of local currency "to be available to the Government of the United States in the manner required by it." (TRADE REG. REP. (1967 Trade Cas.) ¶ 72,203, at 84,330). As the Maritime Commission had made clear in the PSI proceeding that its "jurisdiction cannot be expanded or contracted merely by the underlying financial arrangements of ocean shipping", (J.A. 117), so the court in the *Concentrated Phosphate* case made clear that applicability of the Webb-Pomerene Act exemption from the Sherman Act is not affected by the underlying financial arrangements of commodity procurement. And in both cases the fact that AID was the financing agency was of utterly no moment. Thus, it is clear that, similarly, there is no justification for expanding or contracting the foreign-commerce jurisdiction of the Sherman Act because of the underlying financial

arrangements of procurement of commodities or transportation, regardless of whether such financing is provided by AID, the Chase Manhattan Bank, or the Bank of Tokyo. Appellants have, understandably, been unable to cite a single authority to the contrary.

III. The Complaint Was Properly Disposed of on the Pleadings and Additional Materials Submitted to the District Court.

The court below properly disposed of appellants' complaint on the basis of the pleadings and other materials submitted to it, including the findings of fact of the Maritime Commission with regard to the very matters alleged in the present complaint. A motion to dismiss an antitrust complaint for failure to allege a restraint of United States interstate or foreign commerce does not raise any of the complex substantive antitrust issues which the Supreme Court has said are not appropriate for summary disposition. Such a motion does not ask the court to resolve summarily a substantive issue of motive or intent, as in *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), or complex substantive issues of defense, as in *Levin v. Joint Commission on Accreditation of Hospitals*, 122 U.S. App. D.C. 383, 354 F.2d 515 (D.C. Cir. 1965). The motions to dismiss of appellee Farrell and others which were passed on by the court below raised a single basic issue which courts in antitrust proceedings customarily dispose of on the pleadings—the issue whether appellants had sufficiently pleaded that the alleged conspiracy restrained United States interstate or foreign commerce. The Supreme Court has disposed of antitrust litigation on the pleadings on precisely this type of issue in a number of cases, *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *American Banana Co. v. United Fruit*

Co., 213 U.S. 247 (1909), as have other courts, *Lieberthal v. North Country Lanes, Inc.*, 332 F.2d 269 (2d Cir. 1964); *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir.), cert. den., 361 U.S. 884 (1959); *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952).

The jurisdictional issue is especially appropriate for summary disposition in this case since the Court has before it not only the detailed factual allegations of the complaint, but also the findings of fact of the Maritime Commission. These findings are in no way at odds with the factual allegations of the complaint but merely amplify and clarify certain of those allegations, thus providing the court with the fullest and most reliable possible basis for disposition of the jurisdictional issue without putting the parties to the further effort and expense of an unnecessary trial on the matter. In seeking a trial on the factual matters involved in the jurisdictional question, appellants are seeking nothing more than the opportunity to relitigate the same factual matters which were fully litigated before and determined by the Maritime Commission. In resolving the factual questions involved in determination of its jurisdiction over PSI's complaint, the Commission passed upon every pertinent factual question which appellants regard as material to determination of the jurisdictional issue involved in this case. The Commission fully resolved those matters by its findings that the operations of PSI and Seafarers were "wholly foreign", that "AFBO is an organization of American flag vessels plying a trade totally within the confines of foreign Far Eastern ports", and that the only role of AID with respect to the Far East interport trade was that of "financier" of commercial transactions "between foreign principals." (J.A. 116-117).

Under well-established principles of collateral estoppel, appellants and appellees are bound in this proceeding by those factual findings of the Commission. Under the doctrine of collateral estoppel, a judgment precludes a party and those in privity with him from relitigating factual issues actually litigated and determined in the prior suit, regardless of whether the prior suit was based on the same cause of action as the second suit. *E.g., Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955). This doctrine applies to bar such relitigation in a court of factual matters determined by an administrative agency acting in a judicial capacity. *E.g., United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966); *Seatrain Lines v. Pennsylvania R.R.*, 207 F.2d 255, 259 (3rd Cir. 1953). Furthermore, the principles of collateral estoppel apply not only to substantive matters but also to questions of jurisdiction, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401-404 (1940), including findings of an administrative agency that it has no jurisdiction with respect to the matter involved. *Seatrain Lines v. Pennsylvania R.R.*, 207 F.2d at 259. All findings of the Maritime Commission related to matters which were necessary to determination of the issue of the Commission's jurisdiction over the subject matter of the PSI complaint and thus PSI and the other appellants, which are clearly in privity with it, (see J.A. 7, 17) may not relitigate here the Commission's findings.

In any event, as noted above, appellants have not alleged in their complaint facts which are in any way at odds with the factual findings of the Commission. The Commission's findings merely clarify and amplify the factual allegations of the present complaint.

In short, there is no genuine dispute between the parties as to any material jurisdictional facts; the only dispute

is as to the legal conclusions to be drawn from those facts. The complaint and the other materials of record contain a full and, for purposes of the present motions, undisputed recital of all pertinent facts regarding the nature and scope of the alleged conspiracy, the object and the direct effects of the alleged conspiracy, the operations of appellants and appellees, and the role of AID in the financing of the shipping transportation involved here. Clearly the Court has before it far more than ordinarily required for resolution of the question of law whether an antitrust plaintiff has sufficiently pleaded a restraint on interstate or United States foreign commerce. Hence there is no question that appellees are entitled to have the jurisdictional question resolved without the huge expenditure of time and money which a trial on the merits would entail.

CONCLUSION

Appellants are asking this Court to obliterate the jurisdictional boundaries of the Sherman Act which have been wisely established and consistently applied during the 77 years the Act has been in existence. Those jurisdictional boundaries recognize and accommodate the legitimate regulatory interests of the several states, the United States and foreign nations. The reasons urged upon this Court by appellants for erasing those boundaries and extending the United States antitrust laws to restraints on wholly foreign commerce are totally inadequate to justify such a far-reaching step—a step which could have the most profound implications for the relations between the United States and other nations.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX**Statutes and Regulations Involved**

Shipping Act of 1916, 39 Stat. 728 *et seq.*:

Section 14a, as added 41 Stat. 996, 46 U.S.C. § 813:

"§ 813. Determination by Board as to Violations"

The Federal Maritime Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

- (1) Has violated any provision of section 812 of this title, or
- (2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the Board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the Board shall thereupon certify such fact to the Commissioner of Customs. The Commissioner of Customs shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or

possession thereof, until the Board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated."

Section 15, 39 Stat. 733, 46 U.S.C. § 814:

"§ 814. Contracts between carriers filed with Commission; definition of "agreement"; approval, disapproval, etc. by Commission; unlawful execution of agreements; conference agreements and antitrust laws exemptions; civil actions for penalties; terminal leases exemption

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether

or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership or other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be un-

lawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1-11 and 15, of Title 15, and amendments and Acts supplementary thereto...."

Foreign Assistance Act of 1961, 75 Stat. 424 *et seq.*:

Part I, Section 201(b), 75 Stat. 426, 22 U.S.C. § 2161(b):

"§ 2161. Loan authorization for development of economic resources and increase of productive capacities; considerations; prospects of repayment; limitation on countries to receive loans; reports to Congressional committees

(b) The President is authorized to make loans payable as to principal and interest in United States dollars on such terms and conditions as he may determine, in order to promote the economic development of less developed friendly countries and areas,

with emphasis upon assisting long-range plans and programs designed to develop economic resources and increase productive capacities. In so doing, the President shall take into account (1) whether financing could be obtained in whole or in part from other free-world sources on reasonable terms, including private sources within the United States, (2) the economic and technical soundness of the activity to be financed, including the capacity of the recipient country to repay the loan at a reasonable rate of interest, (3) whether the activity gives reasonable promise of contributing to the development of economic resources or to the increase of productive capacities in furtherance of the purposes of sections 2161-2165 of this title, (4) the consistency of the activity with, and its relationship to, other development activities being undertaken or planned, and its contribution to realizable long-range objectives, (5) the extent to which the recipient country is showing a responsiveness to the vital economic, political, and social concerns of its people, and demonstrating a clear determination to take effective self-help measures, (6) the possible effects upon the United States economy, with special reference to areas of substantial labor surplus, of the loan involved. Loans shall be made under sections 2161-2165 of this title only upon a finding of reasonable prospects of repayment, (7) the degree to which the recipient country is making progress toward respect for the rule of law, freedom of expression and of the press, and recognition of the importance of individual freedom, initiative, and private enterprise, (8) the degree to which the recipient country is taking steps to improve its climate for private investment, and (9) whether or not the activity to be financed will contribute to the achievement of self-sustaining growth. Funds made

available under sections 2161-2166 of this title, except funds made available pursuant to section 2165 of this title, shall not be used to make loans in more than ten countries in any fiscal year, except that such loans may be made in any additional country after at least thirty days shall have elapsed following the submission by the President to the Committee on Foreign Relations of the Senate and the Speaker of the House of Representatives of a report stating that the making of loans in such additional country during such fiscal year is in the national interest and giving his reasons therefor.

Part III, Section 609(a), 75 Stat. 442, 22 U.S.C. § 2359(a) :

"§ 2359. Special accounts; establishment by recipient countries; deposits; availability and utilization; disposition of unencumbered balances

(a) In cases where any commodity is to be furnished on a grant basis under sections 2241 and 2242 of this title under arrangements which will result in the accrual of proceeds to the recipient country from the sale thereof, the President shall require the recipient country to establish a Special Account, and

(1) deposit in the Special Account, under such terms and conditions as may be agreed upon, currency of the recipient country in amounts equal to such proceeds;

(2) make available to the United States Government such portion of the Special Account as may be determined by the President to be necessary for the requirements of the United States Government: *Provided*, That such portion shall not be less than 10 per centum in the case of any country to which such minimum requirement has

been applicable under any Act repealed by this chapter; and

(3) utilize the remainder of the Special Account for programs agreed to by the United States Government to carry out the purposes for which new funds authorized by this chapter would themselves be available: *Provided*, That whenever funds from such Special Account are used by a country to make loans, all funds received in repayment of such loans prior to termination of assistance to such country shall be reused only for such purposes as shall have been agreed to between the country and the United States Government.

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BRIEF FOR 22 APPELLEES NAMED HEREIN

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 21,173

FILED DEC 1 1967

Nathan J. Pendergast, CLERK, PACIFIC FAR EASTERS, INC., ET AL., Appellants,

v.

PACIFIC FAR EAST LINE, INC., ET AL., Appellees.

Appeal From Order and Judgment of the United States District
Court for the District of Columbia

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November 20, 1967

STATEMENT OF QUESTION PRESENTED

Four years ago, plaintiff PSI instituted a reparations proceeding before the Federal Maritime Commission, charging these same defendants with the same alleged attempt to exclude PSI and Seafarers, Inc. from the "Far East interport trade" between Taiwan/Thailand and South Vietnam in issue here. Full adversary administrative hearings resulted in dismissal of the administrative complaint, based on Maritime Commission findings that this "Far East interport trade" was a "wholly foreign" operation consisting of the carriage of foreign goods for foreign principals between foreign ports which "neither directly nor materially affected our foreign commerce." (J.A. 119, n. 8)

Failing to appeal the Maritime Commission ruling, plaintiffs in November 1966, filed an antitrust treble damage complaint charging the same key facts and events, already adjudicated in the Maritime Commission proceeding, as a "conspiracy to monopolize" the "Far East interport trade" and to drive plaintiffs "therefrom."

After briefing and oral arguments, the District Court dismissed plaintiffs' complaint on jurisdictional motions to dismiss and/or for summary judgment which asserted that the complaint did not and could not set forth facts alleging a restraint of the trade or commerce of the United States "with foreign nations," particularly in light of the prior Maritime Commission proceedings.

In the view of the undersigned defendants, the question presented on appeal is:

Was the District Court's dismissal of plaintiffs' complaint correct, in light of all the circumstances, including (a) the allegations of plaintiffs' District Court complaint; (b) the prior unappealed Maritime Commission proceedings; and (c) the jurisdictional and substantive requirements of the antitrust laws?

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,173

PACIFIC SEAFARERS, INC., ET AL., *Appellants*,

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Appellees*.

**Appeal From Order and Judgment of the United States District
Court for the District of Columbia**

BRIEF FOR APPELLEES*

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Plaintiffs' instant appeal from the District Court's dismissal of their Sherman Act complaint is the latest chapter in their attempt to capitalize on the same claims of defendants' alleged misconduct in the "Far East interport trade," —i.e., between Taiwan/Thailand and South Vietnam—which plaintiffs brought before the Federal Maritime Commission in a fully litigated reparations proceeding which

* This brief is submitted on behalf of defendants Pacific Far East Line, Inc.; States Marine Lines, Inc.; American President Lines, Ltd.; American Mail Line, Ltd.; Isthmian Lines, Inc.; States Steamship Company; and West Coast American Flag Berth Operators. Other defendants joining in this brief are: Lykes Bros. Steamship Co., Inc.; United States Lines Company; Alcoa Steamship Company, Inc.; Bloomfield Steamship Company; Central Gulf Steamship Corporation; Prudential Lines, Inc.; Stevenson Line, Inc.; Stockard Shipping Co., Inc.; Atlantic & Gulf American Flag Berth Operators; American Union Transport, Inc.; Matson Navigation Company; Waterman Steamship Corporation; American Export Isbrandtsen Lines, Inc.; Moore and McCormack Co., Inc.; and Grace Line Inc.

ended almost three years ago in an unappealed final judgment of dismissal.

Now appealing from *another* dismissal of their complaint, this time by the District Court, based on the "wholly foreign" subject matter involved, plaintiffs refurbish their case before this Court with allegations of "voyages" by their ships to and from United States ports. (A. Br. pp. 2, 19, 20)

But their November 18, 1966 complaint, which was the basis of the dismissal by the District Court, does not allege these claimed United States "voyages," and charges an antitrust conspiracy concerning only the "Far East interport trade" between Taiwan/Thailand and South Vietnam. (J.A. 13-16) And plaintiffs' belated "voyage" assertions are refuted by the Federal Maritime Commission's holding that plaintiff PSI's "wholly foreign" operations consisted solely of the carriage for "foreign principals" of commercial cargoes "originating in one foreign port and destined to another." (J.A. 113-114, 117, n. 7)¹

In addition, these private plaintiffs pose as the protectors of the United States from hypothetical freight overcharges detrimental to the Agency for International Development. (A. Br. p. 29)

But despite more than four years notice of these same claims by plaintiffs, both in the Maritime Commission and in the Court below, neither AID nor any other arm of the United States Government has seen fit to challenge defendants' Far East interport transportation activities in any way.

Thus, as is shown by defendants' detailed statement of the undisputed and indisputable facts which led the District Court to dismiss plaintiffs' belated Sherman Act complaint, no legal basis exists for relitigation of this grievance on the heavy docket of the United States District Court.

¹ Plaintiffs' brief apparently seeks to duplicate their preliminary success before the Federal Maritime Commission, where they defeated jurisdictional motions by alleging their carriage of United States *Government-owned* shipments, and of cargo from the United States transshipped in the Far East. (J.A. 98) After long evidentiary hearings, however, these spurious claims remained unproved and were "necessarily abandoned." *Ibid.*

Factual Background

The Complaint Filed in the District Court

This case is here on appeal from a judgment of the District Court dismissing plaintiffs' private antitrust treble damage complaint alleging a conspiracy to monopolize "the Far East interport trade" and drive plaintiffs "therefrom." (J.A. 13-16).

The complaint itself simply and directly alleges facts which remove the subject matter from the Sherman Act and leave the court without jurisdiction. The trade in which all acts complained of are undertaken is specified in the complaint to be the "Far East interport trade." That trade in turn is described as the service in which both the plaintiff and defendant ocean carriers "pick up cargo at Far East ports and unload it at other Far East ports" (J.A. 11). The interport service is further defined to be transportation of cargoes "from Taiwan and Thailand to South Vietnam." *Ibid.* The complaint makes no allegation that plaintiffs are engaged in any other trade or that they engage in any voyages to or from the United States. (J.A. 12).

The rate-fixing agreement among defendants which is the gravamen of the complaint is only alleged to be "applicable to Far East interport cargo" (J.A. 12). The "combination and conspiracy" alleged as a violation of the Sherman Act is "to monopolize the Far East interport portion of their trade" and "to eliminate *therefrom* all competition from others, particularly the competition of plaintiffs PSI and Seafarers . . ." (J.A. 13).

The four overt acts (discussed in detail below) alleged to have been done in furtherance of the conspiracy all relate solely and specifically to claimed efforts by certain defendants to influence cargo offerings to plaintiffs in their Far East interport carriage of cargo (J.A. 13).

No facts are alleged in the complaint concerning either trade or transportation to or from the United States, or of the United States "with foreign nations." The acts of defendants alleged to have an effect on trade or commerce

are acts relating solely to Far East interport trade between or among foreign nations.

After extensive briefing and oral argument, the District Court ruled, on motions to dismiss and/or for summary judgment, that the complaint does "not state facts constituting a cause of action under the Sherman Antitrust Act" and issued an order dismissing the complaint since the "Court is without jurisdiction of the subject matter of this cause" (J.A. 167).

Plaintiffs' District Court complaint is so inextricably interwoven with plaintiffs' prior complaint for reparations, brought and lost before the Federal Maritime Commission, that a recital of the factual background must necessarily begin with a full recital of that complaint and that proceeding.

The Complaint Proceeding Before the Federal Maritime Commission

In both substance and detail, this Sherman Act complaint paralleled and virtually duplicated the Shipping Act complaint for reparations filed by plaintiff Pacific Seafarers, Inc. (PSI) before the Federal Maritime Commission on April 19, 1963. (Compare J.A. 4-18 with J.A. 38-52).²

² Plaintiffs' Sherman Act complaint added four nominally new plaintiffs, not previously named in the Maritime Commission proceeding. As shown on the face of the Sherman Act complaint, however, plaintiff Seafarers, Inc. was a tramp operation in the Taiwan/Thailand-South Vietnam trade, which traded ships with its affiliate PSI depending on whether tramp or liner service was desired. (J.A. 17). Seafarers' claims were and are identical to PSI's and were litigated together with PSI's before the Commission. (J.A. 59, 88-89, 114).

The remaining plaintiffs, Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp., and J.J. Georgelis, Inc. all of whom have the same address as plaintiff PSI, are all related to PSI at least in that "at all times material hereto" plaintiff J.J. Georgelis, Inc. "served as managing agency for the other plaintiffs." (J.A. 4, 7). None of the violations alleged in plaintiffs' complaint (J.A. 13-16) relate to plaintiffs Great Lakes, Mid-America, and Georgelis. The only asserted "effects" on these plaintiffs derived from various financial arrangements and business dealings among the plaintiffs alleged to have made "the financial well being of PSI and Seafarers" the "key-stone to the financial well being of the other plaintiffs." (J.A. 17).

For this reason, all defendants moved to dismiss plaintiffs Great Lakes, Mid-America, and Georgelis because their alleged injury was not cognizable in a private antitrust suit based on the alleged Sherman Act violation. (J.A. 155). These motions were not ruled on by the District Court because of its dismissal of the complaint on jurisdictional grounds. (J.A. 168).

This 1963 reparations complaint before the Federal Maritime Commission charged a conspiracy among several of the shipping lines named defendants herein, "acting through and in concert with" defendants WCAFBO and AGAFBO,³ "to force complainant out of the trade" which "consists of the carriage between Far East ports" in Taiwan, Thailand, and South Vietnam of what PSI then claimed was "MSTS", "military" and "AID" cargo. (J.A. 40).

In addition to charging the existence of an unfiled and unapproved "Rate Agreement" (hereafter sometimes called the "AFBO Rate Agreement"), among some but not all of the respondent shipping lines, applicable to "Far East Interport Cargo Carried on American-Flag Vessels Owned by Participating Carriers" (J.A. 43-46), PSI's complaint before the Commission alleged four overt acts pursuant to the claimed conspiracy:

1. The issuance by the Director General of Commerce of South Vietnam, "at said respondents' instance," of a directive requiring "that AID cargoes to that country" be carried on "conference liners" so as "to deprive" plaintiffs of AID cargoes (J.A. 41-42).
2. The inducement by respondents of a further order by the Director General in early 1963 to the effect that PSI's "membership in AGAFBO would not constitute "'conference' status for purposes of carrying AID cargoes" to South Vietnam (J.A. 42).
3. Alleged false representations by certain respondents to the Military Sea Transportation Service

³AGAFBO is the shorthand name for defendant Atlantic & Gulf Coast American Flag Berth Operators and WCAFBO for defendant West Coast American Flag Berth Operators, both of which operate pursuant to agreements filed with the Maritime Commission. The remaining defendants herein, all of whom were also respondents before the Federal Maritime Commission, are members of either WCAFBO or AGAFBO except for the Stockard Shipping Co., Inc. which has never been a member of either. (J.A. 27). (Other abbreviations herein include AID for Agency for International Development, AFBO for American Flag Berth Operators, MSTS for Military Sea Transport Service, A. Br. for plaintiffs-appellants' brief, and J.A. for Joint Appendix. For convenience plaintiffs-appellants are referred to as plaintiffs and defendants-appellees as defendants. Unless otherwise indicated, all emphasis herein is supplied.)

(MSTS) to prevent plaintiff PSI from gaining an MSTS contract (J.A. 41); and

4. An alleged agreement on the part of certain respondents to "open" pre-existing "Rate Agreement" rates on cement and fertilizer from Taiwan and Bangkok to South Vietnam "solely for the purpose of forcing" plaintiff PSI "out of the trade" (J.A. 44-45).

Based on these allegations, PSI requested the Federal Maritime Commission, after hearing, to adjudge defendants in violation of the Shipping Act in various respects, to declare the AFBO Far East "Rate Agreement" unlawful unless filed with and approved by the Commission, and "pursuant to Section 22 (of the Shipping Act, 46 U.S.C. § 821) to pay to complainant such sum as the Commission may determine to be proper as an award of reparations for all losses suffered as a result of the unlawful nature" of defendants' challenged activities (J.A. 49-50).⁴

Based on a record of 106 exhibits and 1161 pages of testimony, after lengthy hearings in which PSI and all defendants participated, the Federal Maritime Commission Hearing Examiner, on May 6, 1964, issued a 52-page Initial Decision (J.A. 54-111).

The decision first ruled that PSI had failed to prove any of the key facts as to which the Commission had put plaintiffs to their proof at trial. Thus:

"The record reveals no discrimination by respondents against complainant (the complaint alleged that PSI had not been admitted to the AFBO 'conference,' but omitted to mention that membership had been offered and turned down)." (J.A. 98).

Furthermore:

"the trade in issue does not actually involve cargo owned or shipped by the United States or its agencies." (*Ibid.*)

⁴ Plaintiff PSI's successful maneuvers to avoid jurisdictional dismissal on motion are detailed in note 1, *supra*.

Above all:

"complainant has necessarily abandoned its claim of jurisdiction based upon a trade in goods originating in the United States and transshipped in the Far East, since *the record shows complainant's business to consist exclusively of foreign interport shipments of local origin.*" (*Ibid.*)

Subsequently, the decision assumed PSI's argument that in the Shipping Act "Congress had in mind the same commerce protected by the antitrust laws," and that defendants' agreements would be subject to the Shipping Act unless they were "agreements not affecting the commerce of the United States." (J.A. 102-103).

However, under shipping and Sherman Act precedents, the decision held that defendants' challenged activities "related solely to foreign international trade." (J.A. 111).

Most important, "neither the Rate Agreement nor any 'related understanding' affected the commerce of the United States." (J.A. 103).

Also, the findings rejected PSI's contention that United States foreign commerce was "affected" by PSI's withdrawal from the Far East interport trade, since PSI "was engaged exclusively in foreign-to-foreign commerce, and its American flag status cannot change the nature of its business." (*Ibid.*).

As to the so-called AID cargoes, the decision held that "these were cargoes procured by foreign importers from suppliers located abroad pursuant to normal commercial practices; they were purely foreign in origin and destination, and AID acted only in the capacity of a financing institution." (J.A. 103-104).

Holding that AID's financial involvement could not "convert complainant's business into commerce of the United States" (J.A. 103), the decision concluded that the AFBO Far East Rate Agreement and understandings related thereto "were not Section 15 agreements within the Commission's jurisdiction, and were not required to be filed as such." (J.A. 104).

Finally, the decision concluded that the unfiled agreements with respect to the Far East interport trade and

other filed agreements between these defendants relating to carriage of goods within the foreign commerce of the United States "were in no way interdependent, did not modify one another, and were concerned with different spheres of activity." Thus, "the Rate Agreement and related AFBO agreements were not filed and were not required to be filed." (J.A. 108-109).⁵

The decision's findings also completely exonerated defendants under applicable principles and interpretations of the Shipping Act of 1916, which were examined, at PSI's insistence, as raising factual issues parallel to those under the Sherman Antitrust law.

In pertinent part, the findings traced the entry of the Georgelis interests (plaintiffs PSI and Seafarers, Inc.) into the Far East interport trade in July 1962, and their success in capturing almost all the shipments between Far Eastern commercial principals which defendants previously carried from Taiwan and Thailand to South Vietnam. The findings also established the non-participation of PSI and Seafarers in other Far East traffic (i.e., "military" and "MSTS" shipments) which had been alleged in their complaint.⁶ (J.A. 59-62).

With respect to the first two alleged overt acts, it was found that "complainant's president conceded that it was not actually found ineligible to carry the cargo and was not affected by the Director General's orders" relating to the shipment of AID cement in "conference" or "AFBO" liners (J.A. 87).

As to the third allegation, "respondents' effort, in the form of a protest to MSTS officials, to prevent complainant from obtaining an MSTS contract had no adverse effect—

⁵ In addition, since all the rates in the AFBO agreement were "for foreign interport transportation" (J.A. 105), defendants were not required to file them as rates for "transportation to and from United States ports and foreign ports between all points on its own route," under § 18(b) of the Shipping Act, 46 U.S.C. § 817(b). Also, WCAFBO had been advised that even rates on MSTS cargo in the Far East need not be filed but "may be retained in the tariff for information purposes." (J.A. 105).

⁶ Although PSI had military approval to carry MSTS cargo, it was found that PSI in fact carried no such cargo (J.A. 41, 80).

the contract was awarded four days later, and complainant was not damaged by the delay." (J.A. 87).

In sum, "complainant suffered no loss or damage by reason of any act of respondents prior to the opening of rates on cement and fertilizer in the spring of 1963." (J.A. 87).

As to the fourth allegation concerning this rate opening, "the reduced cement rates and any consequent decrease in revenues, and the alleged loss of contracts in the second quarter of 1963 when complainant was not the low bidder, resulted *not* from concerted action by respondents, but from complete lack thereof—from the cancellation or abandonment of a rate fixing agreement and the consequent restoration of unrestricted competition with respect to the only rates which are claimed to have affected complainant adversely." (J.A. 87).

Furthermore, and viewing all "the relevant circumstances," including the activities of PSI, "in their relation to one another," plaintiffs' charges of an illegal conspiracy were held to be lacking in factual basis in other important respects by reference to cited and pertinent antitrust and Federal Maritime Commission precedents (J.A. 88).

Thus, the findings concluded "that the specification of 'conference' liners was not pursuant to any joint effort of respondents." (J.A. 92).

The findings also concluded that the telegram to MSTS was *not* "in violation of the said approved agreements" (the WCAFBO and joint WCAFBO-AGAFBO agreements) and did not "constitute a modification thereof." (J.A. 94).

And, while the AFBO Far East Rate Agreement itself was technically "a violation of Section 15 if it was within the Commission's jurisdiction, since it fixed transportation rates and was neither filed nor approved," its "purpose and effect" were "not to exclude anyone from the inter-port trade." (J.A. 95).

Noting that the opening of rates was "one of the usual courses of rate-fixing conferences where competition makes it impossible to maintain an agreed rate," the findings concluded that "it was not the Rate Agreement or any

'related agreement,' or even the opening of rates that harmed PSI, but the rates which were independently established following the opening." (J.A. 95).

Accordingly, the Federal Maritime Commission hearing officer concluded that "complainant is not entitled to reparation by reason of any act of respondents or any of them in violation of the Shipping Act of 1916, as amended," and entered an Order dismissing the complaint. (J.A. 110-111).

On appeal, the Federal Maritime Commission issued its report on March 17, 1965, affirming the dismissal of the complaint (J.A. 111-120), a result supported by a brief filed by hearing counsel representing the public interest. (J.A. 99, 112).

The Commission's decision highlighted the following key facts concerning plaintiff PSI's operation:

"PSI operates a common carrier service with American-flag vessels in the Taiwan-Thailand/South Vietnam trade. It does not offer a service between the United States or any of its Districts or Territories or possessions on the one hand and a foreign country on the other hand.

"The principal commodity that it carries is cement and it was these cement offerings which prompted the institution of complainant's service. In addition to its common carrier service, a PSI affiliate [Seafarers, Inc.] operates a charter or tramp service in the same trade, again catering to cement principally.

"The cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port. The shipping arrangements as well as the sales of the commodities are made between foreign principals. Although the U. S. Government through the Agency for International Development (AID) ultimately finances the sales—including the cost of water transportation—our Government in no way participates in the transactions. Indeed, but for the cargo preference laws which require, generally, that fifty percent of AID-financed cargoes move in American flag bottoms, American flag vessel participation in the movement might never have occurred.

"Further, the record is bereft of any evidence that the cement involved was cement transshipped from the United States." (J.A. 113-114).

The Commission concluded that defendant "carriers, within the AFBO [Far East interport] context cannot be deemed to be engaged in the foreign commerce of the United States." (J.A. 117).

It added that "the AFBO agreement neither directly nor materially affected our foreign commerce." (J.A. 119, n. 8).

As for PSI, the Commission found that its "operation has been wholly foreign." (J.A. 117, n. 7).

Hence, per the Maritime Commission, the administrative complaint involved only "foreign to foreign commerce" and *not* "the foreign commerce of the United States"— notwithstanding the participation of American carriers in the foreign trade and the use of the WCAFBO-AGAFBO "machinery" in connection with the AFBO Far East Rate Agreement. (J.A. 117-118).

As to AID's role in these foreign interport shipments, the Commission quoted a January 1964 affidavit by AID Director, David E. Bell, which plaintiffs put before the District Court in *this* proceeding (J.A. 145-147), stating that "as a general rule, AID acts only in the capacity of a financing institution" and "does not procure commodities or make shipping arrangements." (J.A. 116, n. 6).

Noting that its "view in this regard is not unlike that generally held with respect to our antitrust laws," the Commission held that AID financing "does not convert foreign-to-foreign commerce into the foreign commerce of the United States."

"... [I]t is clear that the mere financing by Americans of manufacturing, mining, or other local activities abroad does not come within the Sherman Act.' Report of the Attorney General's National Committee to Study the Antitrust Laws (1955)." (J.A. 117)

In sum, the Commission found "not a modicum of evidence that brings the gravamen of the complaint within the purview of the [Shipping] Act." (J.A. 116).

Accordingly, the Commission dismissed the complaint without passing on the Examiner's remaining detailed findings and conclusions.

Although PSI then could have sought direct review of the Commission's final decision by this Court under the Administrative Orders Review Act, 5 U.S.C. § 1032 (now 28 U.S.C. § 2342), it chose not to do so. Nor did it seek a reopening of the Maritime Commission proceedings, under 46 U.S.C. § 824 and § 16(a) of the Commission's Rules, 46 C.F.R. § 502.261.

Instead, on November 19, 1966, some 20 months after the Maritime Commission decision finally dismissing PSI's reparation claims, plaintiffs filed a Sherman Act complaint in the District Court.

The Basis of the Jurisdictional Motions Below

This complaint, as previously stated, set forth the same key facts and events within the Far East interport cement trade which formed the basis for the Federal Maritime Commission proceedings instigated by plaintiffs.

Thus, after alleging the same AFBO Rate Agreement "applicable to Far East interport cargo" (J.A. 12), plaintiffs now claimed a "combination and conspiracy" among defendants (1) "to monopolize the Far East interport portion of their trade," (2) "to eliminate therefrom all competition from others, particularly the competition of plaintiffs PSI and Seafarers" and (3) "to obtain for such defendants the highest possible amount of AID funds through the perpetuation and maintenance of the [AFBO Far East interport] rate fixing agreement referred to in paragraph 37 hereof." (J.A. 13).

"Pursuant to such combination and conspiracy," defendants were alleged to have done the same four overt acts that formed the basis of the long since dismissed administrative complaint, culminating in the "opening" of agreed Far Eastern rates on cement and fertilizer followed by alleged "unreasonably low" rates on these commodities in the Taiwan-South Vietnam trade. (J.A. 13-15).

Now charging these same actions as Sherman Act violations, plaintiffs sought treble damages of \$22,500,000 plus attorneys' fees, per Clayton Act § 4, 15 U.S.C. § 15, in lieu of the reparations previously and unsuccessfully sought before the Federal Maritime Commission.

All 22 defendants filed motions seeking dismissal or summary judgment with respect to the entire complaint based on lack of jurisdiction over the subject matter.

Typical was the Motion to Dismiss the Complaint in its Entirety filed by defendants Pacific Far East Line, Inc., et al., on February 20, 1967 (J.A. 36-37), based "on the grounds that this Court lacks jurisdiction over the subject matter since only foreign-to-foreign commerce outside the reach of the Sherman Act is involved, and because the complaint fails to state a claim upon which relief can be granted since the prior Federal Maritime Commission reparations proceedings, concerning the same key facts which are again asserted by plaintiffs here, is now a complete bar to any recovery based on plaintiffs' instant complaint." (J.A. 36).

Defendants' supporting memoranda presented the Court with an analysis of the relevant Sherman Act foreign commerce authorities which established that the complaint on its face charged a restraint only on commerce between foreign ports in Taiwan/Thailand and South Vietnam, and failed to allege any restraint on the commerce of the United States *with* foreign nations.

In addition, a number of defendants filed the record of the Maritime Commission proceedings, including plaintiffs' previous complaint, the decision of the examiner and the Commission's appellate review, as exhibits with their motions. (J.A. 38-120, 26-27, 32-34, 128, 130).

Some defendants contended that these prior Federal Maritime Commission proceedings established the factual deficiencies of the complaint in light of the policies of "primary jurisdiction." (Statement of Points and Authorities of Farrell Lines, Inc. p. 10, January 31, 1967; Memorandum of Points and Authorities of Pacific Far East Lines, Inc., et al., pp. 22-36, February 20, 1967). Others pointed to the collateral estoppel effect of the Maritime Commission proceedings. (Statement of Points and Authorities of Waterman Steamship Corp. pp. 7-12, February 20, 1967; Statement of Points and Authorities of Moore and McCormack Co. pp. 7-12, April 14, 1967).

In addition, all defendants who filed Motions for Summary Judgment contended in their Rule 9(h) statements of material fact that the complaint on its face, and in light of the prior Maritime Commission proceedings, conclusively established the "wholly foreign" nature of the alleged restraint, and that no factual issues clouded the jurisdictional question before the court. (J.A. 27-28, 35-36, 129-130, 152-153).

Plaintiffs responded with a legal memorandum setting forth most of the same arguments now before this Court, and also a "Statement of Genuine Issues" of fact. (J.A. 159-166). Plaintiffs' statement did not attempt to put specific jurisdictional facts in issue, but claimed that defendants' arguments were conclusory and that "the complaint speaks best for itself, and, if it is to be construed, it is for the Court to construe it." (J.A. 159, 161, 162, 165).

All jurisdictional motions were consolidated for argument and heard on June 2, 1967. (J.A. 154).

At the hearing, defense counsel argued that "accepting plaintiffs' own facts, it [the District Court complaint] fails to state a cause of action under the traditional accepted principle of Sherman Act interpretation for the last seventy-seven years," (Oral Argument, Tr. pp. 59-60), and that the prior Maritime Commission proceedings required a construction of the complaint which confirmed the absence of Sherman Act jurisdiction (Oral Argument, Tr. pp. 27-28).

Plaintiffs' counsel stated that "I think it is true that there is no case, exactly like this in the past seventy-seven years of the Sherman Act" (Oral Argument Tr. p. 31), and requested the District Court to devise an unprecedented and novel interpretation of Sherman Act jurisdiction.

At the close of the hearing, the District Judge, having "had an opportunity over the past several days to review the pleadings very carefully and to review the briefs which have been filed," ruled that the complaint did "not state facts constituting a cause of action under the Sherman Antitrust Act and, therefore, the Court is without jurisdiction and the motions to dismiss will be granted." (J.A. 167).

An order dismissing the complaint in its entirety, since the "Court is without jurisdiction over the subject matter of this cause," was entered on June 9, 1967 (J.A. 167).⁷ This appeal followed.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes are printed in the Appendix.

SUMMARY OF ARGUMENT

In this case, plaintiffs brought before the District Court substantially the same grievance upon which they had unsuccessfully sought Shipping Act reparations from these same defendants in an action before the Federal Maritime Commission, culminating in an unappealed final judgment of dismissal.

Plaintiffs' Sherman Act complaint detailed an alleged conspiracy only as to the "Far East interport trade" between Taiwan/Thailand and South Vietnam, and various actions designed to drive plaintiffs "therefrom." Therefore, defendants' jurisdictional motions for summary disposition, relying on the wholly foreign nature of the commerce involved, in light of the prior administrative proceeding, presented a clear issue of law plainly warranting summary dismissal.

By its relevant terms, the Sherman Act applies only to the *trade or commerce of the United States with foreign nations*. Decades of precedent hold that only conduct which restrains or substantially affects *imports, exports or transportation to or from the United States* falls within the reach of the Act.

No such restraint was alleged on the face of the complaint here, for the "Far East interport trade" consisted only of the carriage of foreign goods for foreign principals

⁷ As stated in the oral ruling and the order, the District Court's disposition made it unnecessary to consider other motions by defendants, not now before this Court, including motions to dismiss plaintiffs Great Lakes Bengal Lines, Inc., Mid-America Steamship Corp., and J.J. Georgelis, Inc. for lack of standing to sue under the antitrust laws, challenges to the sufficiency of conspiracy allegations as to some defendants, and certain challenges to venue and service of process. All these unresolved motions are categorized and listed at J.A. 154-157.

between foreign ports. Thus, jurisdictional dismissal was clearly required.

In addition, dismissal of plaintiffs' unprecedented attempt to extend the Sherman Act to foreign-to-foreign interport shipping was supported by important policy considerations in the application of the Sherman Act to ocean shipping. The policies of the Shipping Act which foster cooperation among competing carriers and encourage American carriers to participate in shipping conferences between foreign ports weigh against the adoption of novel and far-reaching Sherman Act jurisdictional theories at the instance of private treble damage plaintiffs.

The jurisdictional deficiencies of plaintiffs' District Court complaint are confirmed by the unappealed Federal Maritime Commission decision, which established the underlying foreign facts of this case in a dispute between these same parties.

Under the doctrine of collateral estoppel and the pragmatic principle of primary jurisdiction, the District Court was required to accept the essential facts as to the "wholly foreign" nature of this controversy and the factual conclusion that the activities complained of did not affect the commerce of the United States *with* foreign nations.

In sum, plaintiffs' complaint not only *did not* but *could not* allege any facts amounting to a proscribed restraint on the commerce of the United States *with* foreign nations.

Plaintiffs cannot now escape the jurisdictional deficiency of their complaint.

Belatedly, plaintiffs now allege that their "voyages" started and ended in the United States. But their complaint contains no such allegation, the Maritime Commission found that plaintiffs provided no transportation services to or from the United States, and plaintiffs' counsel contended before the Federal Maritime Commission that plaintiffs had furnished no such transportation.

Plaintiffs' legal arguments would base antitrust jurisdiction on the status of plaintiffs and defendants as American citizens. But the cases squarely hold, in line with the text of the Sherman Act, that jurisdiction is not determined by the nationality of the parties, but by the target of

the restraint. The alleged target *here* was the foreign-to-foreign "Far East interport trade" between Taiwan/Thailand and South Vietnam, *not* any part of the commerce of the United States *with* foreign nations.

Finally, plaintiffs assert the novel and vague rubric of "national interest" as a Sherman Act jurisdictional test. But there is no support for such a principle in the Sherman Act or its application for 77 years. In view of the global "national interests" of the United States, such an extreme principle would convert the antitrust laws into police regulations reaching into every remote corner of the world. Actually, the "national interests" plaintiffs now profess to safeguard are amply protected by governmental remedies, which have never been invoked in the long history of this four-year-old litigation.

Plaintiffs' specific argument that AID's role in financing the underlying foreign transactions transforms them into commerce of the United States *with* foreign nations has no support in precedent, and has been fully litigated and conclusively resolved against plaintiffs before the Federal Maritime Commission.

In sum, plaintiffs' belated attempt in Sherman Act guise to obtain review of the unappealed final dismissal of this same grievance by the Federal Maritime Commission was properly rejected as a matter of law by the District Court.

ARGUMENT

Introduction

Per the Federal Rules of Civil Procedure, and well-settled principles of federal-court jurisprudence, "whenever it appears" that a Federal District or Appellate Court "lacks jurisdiction of the subject matter" of a case brought before it "the Court shall dismiss the action." Fed. R. Civ. P. 12(h). See *Mellos v. Brownell*, 102 U.S. App. D.C. 67, 250 F. 2d 35 (1957); *Tipton v. Bearl Sprott Co.*, 175 F. 2d 432 (9th Cir. 1949) (appellate tribunals may dismiss action for lack of subject matter jurisdiction whether or not jurisdiction was argued by parties or reached below).

Accordingly, where complaints failed to allege *facts*, rather than legal conclusions, showing a restraint on commerce "among the several states" or "with foreign nations," both private and government actions relying on the Sherman Act have been judicially dismissed before burdensome and protracted antitrust litigation sapped the time and resources of the courts and the parties. E.g., *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-233 (1947) (affirming dismissal of Sherman Act action charging conspiracy to monopolize Chicago local taxicab service); *Elizabeth Hospital, Inc. v. Richardson*, 269 F. 2d 167, 170 (8th Cir. 1959), cert. denied, 361 U.S. 884 (1959); *Hotel Phillips, Inc. v. Journeyman Barbers*, 195 F. Supp. 664, 667-669 (W.D. Mo. 1961), aff'd per curiam, 301 F. 2d 443 (8th Cir. 1962) (both granting motions to dismiss private antitrust complaints which failed to allege facts showing that the challenged conduct restrained or substantially affected commerce "among the several states"); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (affirming dismissal of private antitrust action charging conspiracy to expropriate foreign banana plantations). See also, e.g., *Pauling v. McElroy*, 107 U.S. App. D.C. 372, 374, 278 F. 2d 252, 254 (1960), cert. denied, 364 U.S. 835 (1960) (Motion to Dismiss does not admit "sweeping legal conclusions cast in the form of factual allegations"); *Newport News Shipbuilding & Dry Dock Co. v. Schaufler*, 303 U.S. 54, 57 (1938) (allegations as to involvement of interstate or foreign commerce are "conclusions of law").

And regardless of the scope of the overall activities of the parties, Sherman Act jurisdiction has not been sustained unless the *target* of the alleged restraint is trade or commerce "among the several states" or commerce of the United States "with foreign nations." E.g., *Page v. Work*, 290 F. 2d 323, 330 (9th Cir. 1961), cert. denied, 368 U.S. 875 (1961) (although plaintiff and defendants engaged in interstate commerce activities, Sherman Act action based on restraint aimed at local advertising market dismissed because "the test of jurisdiction is not that the acts complained of affected a business engaged in interstate commerce but that the conduct complained of affects the inter-

state commerce of such business"); *Lieberthal v. North Country Lanes, Inc.*, 332 F. 2d 269, 272 (2d Cir. 1964) (conspiracy to halt construction of bowling facilities utilizing material flowing in interstate commerce not restraint on interstate commerce because flow of materials was not target of conspiracy); *David Cabrera, Inc. v. Union de Choferes y Duenos*, 256 F. Supp. 839, 843-844 (D. Puerto Rico 1966) (Sherman Act action dismissed where target of alleged conspiracy was transport of locally produced construction materials used in conjunction with material flowing in interstate commerce).

Unable to meet the statutory requirements, plaintiffs' complaint in the District Court charged a conspiracy only as to the "Far East interport trade" between Taiwan/Thailand and South Vietnam, based on facts and events already fully litigated between the same parties in a Federal Maritime Commission reparations proceeding instituted by plaintiff PSI. Hence, when defendants challenged the jurisdictional basis of plaintiffs' antitrust treble damage claims, the District Court was bound, under the foregoing principles, to dismiss this case.

For, as we shall show:

I. On its face, plaintiffs' complaint alleged an antitrust conspiracy only as to the trade between Taiwan/Thailand and South Vietnam, not a restraint within the Sherman Act's reach on the trade or commerce of the United States "with foreign nations";

II. Fundamental principles of collateral estoppel and primary jurisdiction, as applied to key facts which were fully litigated and determined between the parties in the prior Federal Maritime Commission proceeding, confirm the defective jurisdictional basis of plaintiffs' complaint.

Therefore, the District Court's ruling and judgment should be affirmed, particularly since:

III. Plaintiffs' baseless and unsound arguments on this appeal only underscore their failure to found a Sherman Act charge on alleged activities in ocean transportation between foreign ports.

L ON ITS FACE, PLAINTIFFS' COMPLAINT ALLEGED AN ANTI-TRUST CONSPIRACY ONLY AS TO THE TRADE BETWEEN TAIWAN/THAILAND AND SOUTH VIETNAM, NOT A RESTRAINT WITHIN THE SHERMAN ACT'S REACH ON THE TRADE OR COMMERCE OF THE UNITED STATES "WITH FOREIGN NATIONS."

Even without regard to the prior Federal Maritime Commission proceedings, plaintiffs' complaint charging a conspiracy to restrain and monopolize the "Far East inter-port trade" (J.A. 13-16) fails to allege facts showing that they were injured by any "conduct forbidden in the anti-trust laws" as required by Clayton Act § 4, the jurisdictional basis of plaintiffs' District Court action.

As we shall show:

(A) Plaintiffs' complaint failed to allege any restraint or substantial effects on United States imports or exports, or on transportation between the United States and foreign nations, which have been required in every Sherman Act action involving claimed restraints on commerce of the United States "with foreign nations."

(B) Important considerations of international comity and the harmonization of the Shipping and Sherman Acts militate against the unprecedented extension of the Sherman Act to ocean transportation between foreign ports, at the instance of a private damage plaintiff.

A. Plaintiffs' Complaint Failed To Allege Any Restraint or Substantial Effects on United States Imports or Exports, or on Transportation Between the United States and Foreign Nations, Which Have Been Required in Every Sherman Act Action Involving Claimed Restraints on Commerce of the United States "With Foreign Nations"

The text of the Sherman Act itself makes clear plaintiffs' failure to allege a restraint falling within its prohibitions, by classifying as forbidden conspiracies only those aimed at trade or commerce "*among* the several states" or the commerce of the United States "*with* foreign nations."

No provision reaches the Far East interport trade among foreign nations which was allegedly restrained here. 15 U.S.C. §§ 1-3. See Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 Yale L.J. 655, 660 (1954).

1. Controlling antitrust authorities uniformly require a showing of restraints, or at least substantial effects, on United States imports, exports, or transportation to or from the United States

In determining whether challenged conduct such as the instant foreign interport transportation activities constitutes a forbidden restraint on the commerce of the United States "with foreign nations," the courts in Sherman Act cases have consistently measured its effect on United States imports and exports from or to foreign nations, or transportation between the United States and foreign ports. E.g., *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (United States vanadium exports); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951) (imports and exports of industrial bearings); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (United States sisal imports); *United States v. Pacific & Arctic Railway and Navigation Co.*, 228 U.S. 87 (1913) (transportation between United States and Alaska); *Thomson v. Cayser*, 243 U.S. 66 (1917) (shipping from United States to South Africa); *United States v. Aluminum Company of America (ALCOA)*, 148 F. 2d 416, 444 (2d Cir. 1945) (exports and imports of aluminum ingot); *United States v. Imperial Chemical Industries*, 100 F. Supp. 504, 591-592 (S.D.N.Y. 1951) (exports and imports of explosive powder); *United States v. General Electric Co.*, 82 F. Supp. 753, 891 (D. N.J. 1949) (exports and imports of incandescent lamps); *United States v. Hamburg-Amerikanische P.F.A. Gesellschaft*, 200 Fed. 806 (S.D.N.Y. 1911) (passenger transportation between United States and Europe).

At most, as one lower court decision has stated, where such conduct or agreements do not directly pertain to and restrain imports, exports, or transportation to or from the United States, "[t]he cases hold that the intent and the

result of affecting United States foreign commerce by an agreement to restrain trade brings the matter within the Sherman Act." *In the Matter of Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298, 313 (D. D.C. 1960). Further, as most broadly stated, the result must be "a 'substantial anticompetitive effect on our foreign commerce.'" *Id.* at 314. See *United States v. AL-COA, supra* at 444 (foreign agreements to limit production of aluminum ingot abroad violated Sherman Act because "they were intended to affect imports and did affect them"); *United States v. Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947, 960 (D. Mass. 1950) (joint venture of leading American manufacturers of coated abrasives to establish production facilities abroad violated Sherman Act by restraining export activity on their part and by competitors); *United States v. General Electric Co., supra* at 891 (Carte dividing world market for incandescent lamps violated Sherman Act because of intended and substantial restriction on imports). See also Fugate, *Foreign Commerce and the Antitrust Laws* 22 (1958) ("American courts have not attempted to require even United States citizens in a foreign country to conform to Sherman Act ideas of competition apart from *direct and substantial effect of their activities on U. S. foreign trade*").

But, as plaintiffs conceded before the District Court (Oral Argument, Tr. p. 31), not a single private or government antitrust case in the 77 year history of the Sherman Act has ever applied the Act to condemn activities which did not restrain or substantially affect United States imports or exports from or to foreign nations, or transportation between the United States and foreign nations.

Rather, decades of uniform judicial precedent make clear that agreements, combinations, or conspiracies which affect solely commerce within a foreign country, or between foreign countries, do not fall under the ban of the Sherman Act. E.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (dismissing charges of conspiracy to expropriate American plaintiff's foreign banana plantations); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99, 105 (2d Cir. 1951) (no antitrust violation arises from price

fixing agreement "explicitly confined to Great Britain and Ireland" which "did not affect sales in the United States"); *United States v. Aluminum Company of America*, 44 F. Supp. 97, 246 (S.D.N.Y. 1941), *aff'd on this point*, 148 F. 2d 416 (2d Cir. 1945) (acquisition of controlling interest in foreign companies whose sales "were wholly or almost wholly confined within the countries where they respectively were located" not within Sherman Act jurisdiction when it had not "directly or materially affected the commerce of the United States"). Cf. *United States v. National Lead Co.*, 63 F. Supp. 513, 520, 524 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947) (court would be "without jurisdiction" to consider the price fixing and division of territory agreements applicable to Eastern Europe and British Empire "as such"); *United States v. Minnesota Mining & Manufacturing Co.*, *supra* at 958 ("it is axiomatic that if over a sufficiently long period American enterprises as a result of political or economic barriers, cannot *export* directly or indirectly from the United States to a particular foreign country at a profit, then any private action taken to secure or interfere solely with business in that area, whatever else it may do, does not restrain foreign commerce in that area in violation of the Sherman Act").

And significantly, the *Grand Jury* case, *supra*, which authorized an antitrust investigation of agreements with respect to the Mexican-Japanese cotton trade, on the grounds that *American cotton exports* might be directly involved and *American shipping from West Coast ports* substantially affected, 186 F. Supp. at 312, resulted in no Sherman Act indictment or civil antitrust case.

The commentators are in accord. See, e.g., Celler, *A Congressman's View of Foreign Commerce Aspects of the Sherman Act*, 27 ABA Antitrust Sec. Proceedings 3, 7-8 (1965):

"Our antitrust laws apply to all American business operations abroad which have direct and substantial adverse competitive effects upon the foreign commerce of the United States, and do not apply to business operations abroad that do not have such adverse competitive effects."

Brewster, *Antitrust and American Business Abroad* 76 (1958):

"An American's conduct in trade among or trade with-in foreign nations is not of antitrust concern, unless it is found to have the prohibited consequences for competition in United States export, import, or do-mestic markets."

Thus, it was incumbent on plaintiffs to allege facts show-ing that the acts complained of in this private antitrust suit directly restrained, or *at the very least* had a sub-stantial effect on, commerce of the United States "with foreign nations."

2. Plaintiffs' complaint failed to allege the requisite facts to meet the Sherman Act's jurisdictional requirements

Plaintiffs' complaint failed to meet the established test. On the face of the complaint, the only commerce alleged to have been restrained by defendants is the "Far East interport trade" between Taiwan/Thailand and South Vietnam (J.A. 12).

Per the complaint, carriers in this trade "pick up cargo at Far East ports, and unload it at other Far East ports" (J.A. 11). The only United States connections alleged to bring this foreign-to-foreign interport trade within the Sherman Act are the participation of United States ship-ping lines therein (J.A. 11-12), and the allegation that "funds are provided" for cargoes and freight in the trade by the United States government, particularly AID. *Ibid.*

But such allegations fall far short of indicating any cognizable restraint on commerce of the United States "with foreign nations."

Whether or not the "Far East interport trade" was an "integral part" of defendants' service to and from the United States is beside the point (J.A. 11).⁸ For the heart of this case is the claimed conspiracy to exclude plaintiffs PSI and Seafarers, which operated transporta-

⁸ This allegation (A. Br. pp. 3, 12, 19) is a bald legal conclusion, even if it were not barred by the prior contrary findings of the Federal Maritime Commission. See p. 40, *infra*.

tion services *only* in foreign waters, from this foreign-to-foreign interport trade. And nothing concerning those transportation services could have restrained or substantially affected commerce of the United States "with foreign nations."⁹

In the absence of such a restraint on the commerce of the United States *with* foreign nations, the nationality of plaintiffs and defendants cannot create Sherman Act jurisdiction. See Fugate, *supra*, p. 22; Celler, *supra*, p. 8 ("our courts, however, have not found liability strictly upon United States citizenship"); *American Banana Co. v. United Fruit Co.*, *supra* (dismissing antitrust complaint by one United States corporation against another); compare *In re Grand Jury*, *supra* at 303 (participation of American flag carrier in Mexican-Japanese arrangements under antitrust investigation not deemed controlling factor in determining Grand Jury's jurisdiction to investigate as to possible effects of questioned arrangements on commerce of the United States "with foreign nations"); cf. *United States v. Minnesota Mining & Manufacturing Co.*, *supra* at 957 (foreign production joint venture by American corporations within Sherman Act only if exports are affected).

3. The alleged AID financing of foreign shipments cannot transform wholly foreign commerce into commerce of the United States with foreign nations

As for the alleged role of the United States government and specifically AID in the "Far East interport trade," *nowhere* in the complaint is it alleged that AID or any other United States citizen or agency was either a shipper or consignee of Far East interport cargo involved in this case.

Even on the face of the complaint, therefore, the United States government, through AID, acted only in some un-

⁹ Notwithstanding plaintiffs' repeated assertions on brief in this Court that their ships began and ended their "voyages" in the United States (A. Br. pp. 2, 19, 20), the only commercial "voyages" alleged by the complaint to have been made by plaintiffs PSI and Seafarers were in the "Far East interport trade" between Taiwan/Thailand and South Vietnam (J.A. 12). Compare A. Br. 13 ("If appellants had been engaged in providing a competitive transportation service all the way from the United States to the Far East and back . . .").

defined financing capacity in connection with the cargoes carried in the Far East from foreign shippers to foreign consignees.¹⁰

But no case has ever predicated Sherman Act jurisdiction on such activities. As the Report of the Attorney General's National Committee to Study the Antitrust Laws concluded:

“in the absence of requisite effects on this country’s ‘trade or commerce . . . with foreign nations,’ however, it is clear that the mere financing by Americans of manufacturing, mining or other local activities abroad, does not come within the Sherman Act.” *Report of the Attorney General’s National Committee to Study the Antitrust Laws* 80 (1955).

See *United States v. Minnesota Mining & Manufacturing Co.*, *supra* at 962 (“export of capital is not export trade”).

Indeed, a recent well-reasoned District Court ruling as to the significance of AID financing makes clear that even where AID participates in the purchasing and shipping arrangements, its involvement does not change the nature of the underlying commerce for antitrust purposes. *United States v. Concentrated Phosphate Export Ass’n, Inc.*, 1967 CCH Trade Reg. Rep. ¶ 72,203 (S.D.N.Y. 1967) (dismissing government Sherman Act injunction action based on alleged price fixing by Webb-Pomerene export association on commodities purchased by AID for Korean government; shipments retained their character as exports exempt from Sherman Act despite AID involvement because goods were moving from United States to Korea).

• • •

In short, nowhere in the complaint do plaintiffs even attempt to allege that transportation to or from the United States or imports or exports to or from the United States were restrained or even substantially affected by defendants’ challenged activities.

¹⁰ Moreover, the affidavit of David E. Bell, AID Director, which plaintiffs put before the District Court, confirms that “AID, itself, does not procure any commodities or make shipping arrangements. As a general rule, AID acts only in the capacity of a financing institution” (J.A. 145).

The complaint thus falls short of any test of the Sherman Act's reach enunciated by the courts or commentators, and is manifestly deficient under all the decided precedents involving commerce *of* the United States "with foreign nations."

Accordingly, the District Court's dismissal of plaintiffs' complaint could have properly rested on its on-face jurisdictional failure to allege the requisite restraint or effects on commerce *of* the United States "with foreign nations," even without consideration of the prior Maritime Commission proceedings. Indeed, had the District Court not done so, this Court itself would presumably dismiss the complaint on this jurisdictional basis.

B. Important Considerations of International Comity and the Harmonization of the Shipping and Sherman Acts Militate Against the Unprecedented Extension of the Sherman Act to Ocean Transportation Between Foreign Ports, at the Instance of a Private Damage Plaintiff

Important policy considerations applicable to the maritime industry confirm the soundness of the District Court's refusal to stretch accepted Sherman Act tests to uphold this private treble damage complaint. Indeed, this is an *a fortiori* case for adherence to the traditional test that only activities which restrain or substantially affect commerce *of* the United States "with foreign nations" are governed by the Sherman Act.

For the United States Shipping industry, basic Congressional policy is spelled out in the Shipping Act of 1916, as amended, 46 U.S.C. § 801 *et seq.* Modifying the application of antitrust principles to ocean shipping, Congress exempted filed agreements among ocean carriers from the antitrust laws. Shipping Act § 15, 46 U.S.C. § 814.

But since Section 15 applies only to agreements among carriers "by water in foreign commerce" of the United States, Section 15 registration is unavailable for foreign-to-foreign ocean transportation. Shipping Act § 1, 46 U.S.C. § 801. See, e.g., *Investigation of Practices, Operations, Actions and Agreements West Coast of Italy, etc., Trade*, 7 S.R.R, 515, 531 (1966). Rather, in such foreign-to-foreign

trade. Section 14a of the Shipping Act, 46 U.S.C. § 813, secures the right of American carriers to participate in *foreign* conferences. As to such conferences, the Maritime Commission "upon its own initiative or upon complaint shall" bar foreign carriers from United States ports if they are parties to a

"combination, agreement, or understanding, express or implied . . . between foreign ports . . . that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission."

Pursuant to this statutory policy, virtually all American ocean carriers have entered into many such unfiled and unfileable foreign conference agreements to obtain equal opportunity in worldwide commerce. In light of this policy and widespread American membership in foreign shipping conferences, any extension of Sherman Act antitrust jurisdiction to the foreign-to-foreign interport trade between Taiwan/Thailand and South Vietnam would have far-reaching and unfortunate consequences. A host of other American carriers' unfileable foreign conference activities would incur Sherman Act peril at the whim of potential treble damage plaintiffs all over the world. The new and drastic Sherman Act liabilities asserted here would reach foreign and American firms alike. See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (Sherman Act prohibits agreements between American, British and French corporations affecting United States imports and exports).

In short, validation of plaintiffs' jurisdictional claims would expose the American maritime industry to unprecedented and novel sanctions and forfeitures under the Sherman Act in foreign ocean transportation—although it is governed by the Shipping Act in transportation to and from the United States. Thus, American carriers would be subject to *more* stringent limitations on their co-operative activities in purely foreign commerce than they are in connection with their trade to or from the United States. Paradoxically, the United States would be exercis-

ing the most stringent control over that commerce which concerns it least.

Actually, such an unprecedented inversion of policy would mock the custom and practice of all commercial nations. See International Aspects of Antitrust, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 38-39 (1967) (testimony of Dr. Corwin Edwards: "in each country" antitrust-type controls are relaxed where restrictions are "to be effected only outside the country").

As courts and commentators have recognized, application of the Sherman Act, a criminal statute, to *any* business activities primarily or solely affecting trade within or between foreign nations may cause "international complications." *United States v. ALCOA*, 148 F. 2d 416, 443 (2d Cir. 1945); see *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, 2 All E.R. 88 (Ct. App. 1952) (refusal to enforce United States antitrust decree as applied to transfer of patents within Great Britain because decree infringed upon "rights and sovereign authority" of British Courts); Fugate, *Foreign Commerce and the Antitrust Laws* 54 ("the consideration of international comity" is "always present" in foreign commerce cases: "The courts are perhaps more reluctant for this reason to conclude that foreign local activities are part of United States foreign commerce."); Whitney, *Sources of Conflict Between International Law and the Antitrust Laws*, 63 Yale L.J. 655, 660 (1954) ("foreign affairs involve a whole mass of potential conflicts").

Such considerations are particularly compelling in the international maritime industry. Per the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953):

"The virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea."

To avoid such policy conflicts and international law complications, the District Court could properly decline to adopt novel and unprecedented claims extending the overseas reach of the Sherman Act—particularly when pressed, not by the United States government, but by private plaintiffs for private gain.

II. FUNDAMENTAL PRINCIPLES OF COLLATERAL ESTOPPEL AND PRIMARY JURISDICTION, AS APPLIED TO KEY FACTS WHICH WERE FULLY LITIGATED AND DETERMINED BETWEEN THE PARTIES IN THE PRIOR FEDERAL MARITIME COMMISSION PROCEEDING, CONFIRM THE DEFECTIVE JURISDICTIONAL BASIS OF PLAINTIFFS' COMPLAINT.

Confirming that the jurisdictional defects in plaintiffs' complaint were not an instance of careless pleading but exposed fundamental gaps in their underlying factual claims, the final adjudication by the Federal Maritime Commission in PNSI's prior reparations action on these same key facts lends further support to the District Court's judgment of dismissal.

With the rulings in the Maritime Commission as a guide, the District Court was not required to speculate about potential expansions and tenuous constructions of the complaint. Indeed, the prior Federal Maritime Commission proceeding negated plaintiffs' claim of Sherman Act jurisdiction as a *matter of law*. For:

A. Collateral estoppel bars plaintiffs from relitigating the "wholly foreign" nature of their operations as well as other jurisdictional facts adjudicated by the final and unappealed Maritime Commission decision on these same factual claims;

B. Practical primary jurisdiction considerations, confirmed by the Supreme Court in maritime industry cases, underscore the decisive effect of the Maritime Commission proceeding in this belated antitrust case based on the same factual grievances; and

C. Either way, the prior Maritime Commission proceeding shows that the Far East interport trade, which is the subject of plaintiffs' antitrust complaint, consisted solely of the carriage of foreign goods for foreign principals between foreign ports, so that no restraint on this trade cognizable under the Sherman Act was or could be alleged.

A. Collateral Estoppel Bars Plaintiffs From Relitigating the "Wholly Foreign" Nature of Their Operations as Well as Other Jurisdictional Facts Adjudicated by the Final and Unappealed Maritime Commission Decision on These Same Factual Claims.

The binding effect of a prior determination of the same basic facts is made clear by the Supreme Court's landmark decision in *Southern Pacific R.R. v. United States*, 168 U.S. 1, 48-49 (1897):

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the social order."

The principle of "collateral estoppel" which holds that "determinations of fact, and mixed law and fact" are "conclusive in subsequent proceedings" between parties who have once litigated them, is now universally accepted. *Yates v. United States*, 354 U.S. 298, 336 (1957); see Moore, Federal Practice ¶ 10.441[1] (collecting cases affirming principle of collateral estoppel); Restatement, Judgments, § 68.¹¹

The "general principles of collateral estoppel" apply to Maritime Commission reparations decisions and prior judi-

¹¹ This Court has taken a broad view of the doctrine. As was said in *Gill v. Gill*, 79 U.S. App. D.C. 357, 359, 147 F. 2d 154, 156 (1945):

"The trial judge may not, in a subsequent action between the same parties, reject as unproved any facts pleaded or grounds alleged which, if proved, had any reasonable tendency to establish the conclusion of the trial judge in the earlier case, or to support the judgment entered."

cial determinations alike. As per *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) :

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."¹²

Other decisions are in accord. E.g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (binding effect of coal board determination that plaintiff's coal was bituminous); *Fairmont Aluminum Co. v. Commissioner*, 222 F. 2d 622, 627 (4th Cir. 1955) (collateral estoppel effect of tax court adjudication when that court is "exercising judicial functions"); *Baltimore & Ohio R.R. v. New York N.H. & H.R.R.*, 196 F. Supp. 724 (S.D.N.Y. 1961) (conclusive effect of ICC decision raised as bar to antitrust counter-claim); 2 Davis, *Administrative Law Treatise* §§ 18.01-18.10.¹³

¹² In *Utah Construction*, the Supreme Court also criticized "too broad" assertions that *res judicata* is inapplicable to administrative determinations, 384 U.S. at 419, in cases which concern the different issue of the effect of a prior administrative determination on a subsequent administrative determination by the same administrative body. *Churchill Tabernacle v. FCC*, 81 U.S. App. D.C. 411, 160 F. 2d 444 (1947); *Niagara Mohawk Power Corp. v. FPC*, 91 U.S. App. D.C. 395, 202 F. 2d 190 (1952), *aff'd on other grounds*, 347 U.S. 239 (1954); *Jason v. Summerfield*, 94 U.S. App. D.C. 197, 214 F. 2d 273 (1954), *cert. denied*, 348 U.S. 840 (1954) (all discussed and distinguished in 2 Davis, *Administrative Law Treatise* § 18.02, at 551-553). Where administrators have made decisions of a judicial nature, collateral estoppel has been enforced by this Court. *Aiken v. Cogswell*, 91 U.S. App. D.C. 339, 201 F. 2d 705 (1952) (collateral attack on decision by D.C. Rent Administrator barred).

¹³ This principle is equally applicable in antitrust cases. See *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326-330 (1955) (applying general principles of *res judicata* and collateral estoppel to private antitrust action).

Nothing in *United States v. First City National Bank*, 386 U.S. 361 (1967) (cited A. Br. p. 32) is to the contrary. There the Supreme Court interpreted a statute which required "*review de novo*" of an administrative proceeding which was informal, not adversary, and to which the United States was not a party. Even in these circumstances, the Supreme Court said "the courts may find the Comptroller's reasons persuasive or well nigh conclusive." *Id.* at 369. And *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), held only that a shipper injured by an unlawful agreement had a remedy under the Shipping Act or the antitrust laws. The court did not pass on the status of factual determinations made by the Commission, and indeed required the antitrust proceeding to be stayed so that appeals from administrative hearings

In addition, collateral estoppel applies to resolution of the facts underlying the jurisdictional issue before the Maritime Commission, despite the eventual finding that the arrangements at bar were beyond the Commission's regulatory sphere under the Shipping Act. Thus, in *Sunshine Anthracite Coal Co. v. Adkins*, *supra* at 403, the Court gave binding effect to a Coal Board determination that certain coal was bituminous, despite the contention that the Board lacked jurisdiction, saying:

"The suggestion that the doctrine of *res judicata* does not apply unless the court rendering the judgment has jurisdiction of the cause is sufficiently answered by *Stoll v. Gottlieb*, 305 U.S. 165 and *Treines v. Sunshine Mining Co.*, 308 U.S. 66. As held in those cases, in general the principles of *res judicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties."¹⁴

For, as explained in *Art Metal Construction Co. v. United States*, 13 F. Supp. 756, 758 (Ct. Cl. 1936), the so-called lack of subject matter jurisdiction (A. Br. 30) in this statutorily based action simply means that "the evidence failed to show some fact which under the statute must be established to maintain [the] action."

In short, as stated by Judge Tuttle in *Esterez v. Nabers*, 219 F. 2d 321, 323-324 (5th Cir. 1955):

"Plaintiff insists that the first judgment was not 'on the merits' and should not bar this subsequent action. The dismissal of the first action can be ascribed to a

could be completed. This Court's footnote in *Volkswagenwerk Aktiengesellschaft v. FMC*, 125 U.S. App. D.C. 282, 294, n. 13, 371 F. 2d 747, 759 n. 13 (1966) to the effect that conspiracies by carriers re labor matters completely outside the Maritime Commission's subject matter jurisdiction may be subject to the antitrust laws (see A. Br. p. 33), obviously does not deal with the collateral estoppel effect of the facts once established in litigation before the Commission concerning maritime matters.

¹⁴ See also, e.g., *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) ("there must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court"); *Leung Gim v. Brownell*, 238 F. 2d 77 (9th Cir. 1956); *Hicks v. Holland*, 235 F. 2d 183 (6th Cir. 1956), cert. denied, 352 U.S. 855 (1956); *Art Metal Const. Co. v. United States*, 13 F. Supp. 756 (Ct. Cl. 1936) (all giving *res judicata* effects to facts and issues necessarily determined in "jurisdictional" decisions).

lack of jurisdiction or to the absence of a substantive claim: actually the ground of dismissal amounted to both of these. But even if regarded as a decision not on the merits, *the first action precludes a new adjudication of the question actually decided.*"¹⁵

In this case, the Maritime Commission, after lengthy proceedings and plenary consideration, rendered a considered decision that the record failed to establish that plaintiffs' grievance was "intimately related" to or "materially affected" the commerce of the United States "with foreign nations"—a prerequisite to its jurisdiction under the Shipping Act. No appeal from this ruling was taken by plaintiffs.

Thus, plaintiffs are now bound in this litigation against these defendants by the Maritime Commission's "determinations of fact, and mixed fact and law, that were essential to the decision," and are barred "from attempting a second time to prove a fact that [they] sought unsuccessfully to prove." *Yates v. United States*, 354 U.S. 298, 336 (1957).¹⁶

¹⁵ Plaintiffs extensive citation of cases for the proposition that *res judicata* does not attach to determinations on non-jurisdictional issues when jurisdiction is lacking (A. Br. pp. 34-36) is inapposite to the question whether determinations of issues of jurisdictional fact are binding. These decisions merely make the unquestioned point that findings by an agency "not relevant to a dispute over which it has jurisdiction" do not have collateral estoppel effect. *United States v. Utah Construction Co.*, 384 U.S. at 419 n. 15. But "it is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the merits." *Angel v. Bullington*, 330 U.S. 183, 190 (1947); see also *Stoll v. Gottlieb*, 305 U.S. at 171.

Thus, findings as to jurisdictional issues were "relevant to a dispute over which [the Maritime Commission] had jurisdiction;" i.e., a dispute as to whether the facts proved in the hearings on PSI's reparations complaint added up to a claim cognizable under the Shipping Act. "Public policy dictates" in these circumstances "that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 526 (1931) (applying *res judicata* to determination of personal jurisdiction).

¹⁶ Although plaintiffs Great Lakes Bengal, Mid-America and J. J. Georgelis, Inc. were not parties before the Commission, they are bound as privies of PSI, since they allege no independent wrong and their claims are derivative, based entirely on injury consequential to injury to PSI. E.g., *Southern Pacific R.R. v. United States*, 168 U.S. 1, 48-49 (1897) (collateral estoppel applies to parties and privies). See *Fischbach v. Auto Boys, Inc.*, 106 N.Y.S. 2d 416 (1951); *Stephens v. Snyder*, 65 Ga. App. 36, 14 S.E. 2d 687 (1941) (spouses' consequential damage claims barred by decisions adverse to injured spouses because consequential claimants deemed to be privies).

Since an affirmative determination of at least a connection with or a substantial effect on the commerce of the United States "with foreign nations" is also a prerequisite to jurisdiction under the Sherman Act, the Federal Maritime Commission's determination that the record facts failed to establish such connection or effect on that commerce compels dismissal here.

B. Practical Primary Jurisdiction Considerations, Confirmed by the Supreme Court in Maritime Industry Cases, Under-score the Decisive Effect of the Maritime Commission Proceeding in This Belated Antitrust Case Based on the Same Factual Grievances.

Beyond the doctrine of collateral estoppel, the decisive importance of the completed Maritime Commission proceeding is also confirmed by well established "practical" policies recognizing the "primary jurisdiction" of expert administrative agencies.

As the Supreme Court has stressed, in maritime cases which involve factual and policy issues with important consequences for ocean shipping, "practical considerations dictate a division of functions between court and agency." *Federal Maritime Board v. Isbrandtsen Co., Inc.*, 356 U.S. 481, 498 (1958).

Under the doctrine of "primary" or "preliminary" jurisdiction, a court will stay proceedings in a maritime antitrust case in order to "avail [itself] of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern" before ruling on the judicial consequences to be attached to those facts. *Ibid.* As in the related context of air transportation, such a division of authority gives the District Court "the benefit of these [administrative] proceedings in determining the issue of antitrust violation." *S.S.W., Inc. v. Air Transport Ass'n.*, 89 U.S. App. D.C. 273, 280, 191 F. 2d 658, 664 (1951), *cert. denied*, 343 U.S. 955 (1952).

This primary jurisdiction doctrine is a *practical* rather than technical concept, recognizing that "investigation of

the factual issues can often be handled best by the administrative agency in the light of its extensive experience in dealing with the industry." *Maddock & Miller, Inc. v. United States Lines*, 365 F. 2d 98, 102 (2d Cir. 1966). On this basis, the doctrine has been applied in the maritime field irrespective of the regulatory agency's power or jurisdiction to immunize the particular challenged industry conduct from the applicable antitrust laws. *Ibid.* (stay of Sherman Act claim pending disposition by Federal Maritime Commission). See also *Carter v. American Telephone & Telegraph Co.*, 365 F. 2d 486, 499 (5th Cir. 1966) (stay of Sherman Act claim pending Federal Communications Commission disposition).

Moreover, this pragmatic policy applies "even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." *Far East Conference v. United States*, 342 U.S. 570, 574 (1952) (Sherman Act suit by government to enjoin dual system of rates under a conference agreement dismissed since "initial submission to the Federal Maritime Board is required").

And since this policy is not limited by whatever technical concepts may limit the doctrine of collateral estoppel, it has been realistically employed by the courts to prevent repetitive litigation of a factual grievance previously resolved by an administrative agency. See *Burroughs v. Black Diamond Steamship Corp.*, 4 S.R.R. 21,039 (N.Y. Sup. Ct. Jan. 9, 1967) (shipping refund claims barred by prior determination in Federal Maritime Commission rulemaking proceeding). See also, e.g., *McCleneghan Co. v. Union Stock Yards Co.*, 298 F. 2d 659, 668 (8th Cir. 1962) (administrative determination that stock bidding system "was a combination which unreasonably restricted competition" binding on antitrust defendants who "were not parties to the Berigan [administrative] litigation"). *United States v. Western Pacific R.R.*, 352 U.S. 59, 69 (1956) (in Interstate Commerce Commission tariff case, primary jurisdiction may apply if the Commission, "in prior releases or opinions, has

already construed the particular tariff at issue or has clarified the factors underlying it").¹⁷

Thus, had appellants filed the instant suit *de novo*, the District Court would no doubt have stayed it pending the completion of precisely the same administrative proceeding which has already occurred in this case. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 224 (1966); *Far East Conference v. United States*, *supra*; *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932); *Maddock & Miller, Inc. v. United States Lines*, *supra* at 102. See also *Carter v. American Telephone & Telegraph Co.*, *supra* at 498-500; *McCleneghan Co. v. Union Stock Yards Co.*, 298 F. 2d at 670 (staying antitrust suits

¹⁷ Given the pragmatic nature of the primary jurisdiction doctrine, plaintiffs' contention (A. Br. pp. 34-36) that the findings of the Hearing Examiner should "be disregarded" and treated as a "nullity" has no validity. The Examiner's findings marshalled the relevant facts "into a meaningful pattern," which was pertinent in construing plaintiffs' Sherman Act complaint.

Understandably, plaintiffs would prefer to ignore the key findings that (1) the alleged injury to PSI "resulted not from concerted action by [defendants] but from complete lack thereof—from the cancellation or abandonment of a rate fixing agreement and the consequent restoration of unrestricted competition" (J.A. 87); (2) defendants' allegedly injurious rates were not unreasonable (J.A. 96); and (3) the decision by defendants to open rates was necessitated by their practical exclusion from the Far East interport trade by PSI (J.A. 95) which was "extending to some or all cement shippers some form of financial inducement more favorable than was provided by the AFBO Rate Agreement which PSI purported to follow" (J.A. 90). Compare *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496-497 (1951) (weight should be given to findings of examiner who has "lived with the case").

For these findings would refute plaintiffs' claim of injury "by reason of" an antitrust violation which is necessary to sustain a private action under Clayton Act § 4. E.g., *McCleneghan Co. v. Union Stock Yards Co.*, 349 F. 2d 53, 56 (8th Cir. 1965); *Association of Western Rys. v. Biss & Co.*, 112 U.S. App. D.C. 49, 299 F. 2d 133 (1962), cert. denied, 370 U.S. 916 (1962).

In addition, as the Examiner pointed out (J.A. 98), PSI's voluntary participation in the allegedly illegal AFBO Agreement would bar it from recovery under the "pari-delicto" doctrine (J.A. 97). E.g., *Crest Auto Supplies, Inc. v. Ero Manufacturing Co.*, 360 F. 2d 896, 900 (7th Cir. 1966) (summary judgment barring recovery by voluntary participants in illegal conspiracy).

pending administrative proceedings in other regulated industries).¹⁸

Since this prior Maritime Commission proceeding has already enabled the Commission not only to rule on the Shipping Act status of plaintiffs' claims, but also to gather and appraise the relevant facts with the aid of its expertise in the domestic and foreign maritime industry, the District Court could properly have viewed the facts marshalled by the Maritime Commission as determinative—at least as to plaintiffs' complaint concerning these defendants' activities in the "Far East interport trade."

In short, the facts found in the proceeding before the Commission show the foreign nature of the Taiwan/Thailand to South Vietnam Far East interport trade, the "wholly foreign" operations of plaintiffs, and the lack of impact of the alleged misconduct in the Far East interport trade on the commerce of the United States *with* foreign nations. Having been "appraised by specialized competence" in the administrative proceeding, these facts could properly serve as a "premise for legal consequences to be judicially defined"—here the District Court's dismissal of plaintiffs' Sherman Act complaint. *Far East Conference v. United States, supra* at 570.¹⁹

¹⁸The need for a reference to the Federal Maritime Commission to determine the facts relating to plaintiffs' claims of illegal acts by and through conferences approved by the Maritime Commission (e.g., J.A. 14-15), is obvious, as is the need for expert findings as to the significance of the facts underlying plaintiffs' claim that rates in the Taiwan-South Vietnam trade were reduced to "unreasonably low" levels (J.A. 15). In addition, the Supreme Court and this Court have ruled that the "intent and effect" of particular actions in a regulated industry are properly determined first by the expert agency involved. *Federal Maritime Board v. Isbrandtsen Co., supra* at 499; *S.S.W. Inc. v. Air Transport Ass'n. of America*, 89 U.S. App. D.C. 273, 280, 191 F. 2d 658, 664 (1951), cert. denied, 343 U.S. 935 (1952); *Ries & Co. v. Association of American Railroads*, 170 F. Supp. 354, 365 (D.D.C. 1959).

¹⁹As the Third Circuit said in dismissing an antitrust complaint because of the previous disposition of key issues by the ICC:

"Whatever restraint the rules of primary jurisdiction may impose upon a court asked to regulate conduct merely of potential concern to an administrative agency, we think that, once the administrative agency has made a decisive ruling defining its interest in the matter, any meaningful judicial recognition of primary administrative jurisdiction must respect the administrative ruling actually made." *Seatrail Lines Inc. v. Pennsylvania R.R.*, 207 F. 2d 255, 260 (3d Cir. 1953).

C. Either Way, the Prior Maritime Commission Proceeding Shows That the Far East Interport Trade, Which Is the Subject of Plaintiffs' Antitrust Complaint, Consisted Solely of the Carriage of Foreign Goods for Foreign Principals Between Foreign Ports, So That No Restraint on This Trade Cognizable Under the Sherman Act Was or Could Be Alleged.

Both the equitable considerations underlying collateral estoppel and the pragmatic policies of primary jurisdiction compel construction of plaintiffs' complaint allegations in light of the Maritime Commission's decision, and thus support the District Court's dismissal of that complaint.

The Maritime Commission decision spotlighted the relevant area of competition as solely the Taiwan/Thailand-South Vietnam interport trade—by holding that in activities relevant to the "matters complained of" defendants were "plying a trade totally within the confines of foreign Far Eastern ports" (J.A. 117), and that plaintiffs did "*not offer a service between the United States or any of its Districts or Territories or possessions on the one hand and a foreign country on the other hand.*" (J.A. 113).²⁰

Moreover, the decision established that "the cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port. The shipping arrangements as well as the sale of the commodities are made between foreign principals. . . . Further, the record is bereft of any evidence that the cement involved was cement transshipped from the United States." (J.A. 114).

In addition, the Commission marshalled into a meaningful pattern the facts relating to the lack of impact of the alleged restraint upon the foreign commerce of the United States. In holding that "the subject matter of the AFBO agreement" is not "intimately related" to our foreign commerce, the Commission concluded that the interport trade "does not involve as one terminus any port in a State, District, Territory, or possession of the United

²⁰ The wholly foreign nature of PSI's operations is confirmed by its own admission at the hearing that "it does not furnish transportation to and from United States ports" (J.A. 103, n. 10).

States" and "neither directly nor materially affected our foreign commerce." (J.A. 117-119).

At a minimum, these "facts after they have been appraised by specialized competence, serve as a premise for legal consequences to be judicially determined." *Far East Conference v. United States*, 342 U.S. 570, 574 (1952). Moreover, "as between the same parties or their privies" they must "be taken as conclusively established." *Southern Pacific R.R. v. United States*, 168 U.S. 1, 49 (1897).

Actually, these binding fact determinations directly contradict plaintiffs' new assertions of "voyages" beginning and ending in the United States (A. Br. pp. 2, 19, 20), claims of competition for "part of a stream of commerce to and from the United States" (*Id.* p. 14), and allegations that the Far East interport trade was an "integral part" of defendants United States commerce operations (J.A. 11; A. Br. p. 19). In addition to their legal insignificance under accepted Sherman Act criteria, these speculative claims by plaintiffs are thus exposed as baseless by the Maritime Commission's determination that the "matters complained of" involved the separate competition for carriage of foreign goods for foreign principals in a foreign interport trade which "does not involve as a terminus" any United States port (J.A. 119).

Thus, when marshalled "into a meaningful pattern" by the decision of the Maritime Commission, the facts alleged in appellants' District Court complaint were plainly insufficient to satisfy the applicable Sherman Act standards for "foreign commerce" jurisdiction. *Federal Maritime Board v. Isbrandtsen Co., Inc.*, 356 U.S. at 498.

And plaintiffs' belated attempt to dispute these findings by introducing before the District Court an isolated fragment of the voluminous testimony before the Maritime Commission (J.A. 141-144), is itself a striking example of the need for application of the doctrine of collateral estoppel "to secure the peace and repose of society by the settlement of matters capable of judicial determination." *Southern Pacific R.R. v. United States, supra* at 48-49.

Moreover, the collateral estoppel effect of the Commission's decision in this case is not limited to its unraveling

of the basic facts. In order to determine whether it had jurisdiction over "the matters complained of," the Commission was required to resolve the threshold issue whether the AFBO agreement and the other alleged conspiratorial misconduct related thereto affected United States foreign commerce or were "intimately related" to it. As the Commission's counsel, all parties and the hearing examiner eventually agreed, this issue of law and fact, common to the Sherman Act and the Shipping Act, was a threshold barrier plaintiffs were required to cross in order to obtain a Shipping Act remedy (J.A. 99-100). See *United States v. Anchor Line, Ltd.*, 232 F. Supp. 379, 383 (1964) (cited by the Commission J.A. 119) (applying Sherman Act "foreign commerce" tests of *United States v. ALCOA*, 148 F. 2d at 443-444 to determine Shipping Act jurisdiction). Cf. *Investigation of Practices, Operations, Actions and Agreements West Coast of Italy, etc. Trade*, 7 S.R.R. 515, 531 (1966) (Italian commission arrangements subject to Maritime Commission jurisdiction because they "had some effect on the commerce of the United States"); *Hellenic Lines, Ltd.*, 7 F.M.C. 673 (1964) (rebates granted by Ethiopian agent within Maritime Commission jurisdiction because of effect on commerce of the United States with foreign nations).

The Commission's final determination that the Shipping Act claim was based on matters *not* "intimately related" to the foreign commerce of the United States, and not "directly nor materially affecting" that commerce, marks plaintiffs' failure to prove in full adversary hearings between these parties before the Commission the facts essential to basic Sherman Act jurisdictional tests.

Having once failed in full and fair litigation with these same defendants to cross the same factual barrier that applies under the Sherman Act, and having allowed that decision to become final, plaintiffs have no right to relitigate *de novo* what they could not prove before, in a ruling they chose not to appeal. Thus, the District Court could properly dismiss their action simply by applying Sherman Act legal principles to the conclusively-established "wholly foreign" facts.

III. PLAINTIFFS' BASELESS AND UNSOUND ARGUMENTS ON THIS APPEAL ONLY underscore THEIR FAILURE TO FOUNDED A TENABLE SHERMAN ACT CHARGE ON ALLEGED ACTIVITIES IN OCEAN TRANSPORTATION BETWEEN FOREIGN PORTS.

Faced with an insurmountable deficiency in alleged and allegable facts for bringing these wholly foreign events within the commerce of the United States *with* foreign nations, plaintiffs resort to factual distortions and unprecedented and unsound legal arguments to support their attempt to achieve a treble damage bonanza on the same claims they unsuccessfully pursued before the Maritime Commission.

But, as we shall show:

- A. Plaintiffs' attempt to bolster the United States connections of their claims by belated expansions of the complaint, which are contradicted by indisputable facts, only confirms their inability to allege a restraint on the commerce of the United States *with* foreign nations;
- B. None of plaintiffs' inapposite authorities even remotely indicate that defendants' challenged activities with respect to the carriage of foreign cargo for foreign principals between foreign ports are within the reach of the Sherman Act; and
- C. In particular, plaintiffs' vague "national interest" test of Sherman Act commerce jurisdiction is novel and unsound.

A. Plaintiffs' Attempt To Bolster the United States Connections of Their Claims by Belated Expansions of the Complaint, Which Are Contradicted by Indisputable Facts, Only Confirms Their Inability To Allege a Restraint on the Commerce of the United States With Foreign Nations.

Artfully sprinkled with references to plaintiffs' "voyages" starting and ending in the United States (A. Br., pp. 2, 19, 20), plaintiffs' brief here further asserts that the "business for which the parties were competing was part of the stream of commerce to and from the United States" (A. Br.

p. 14). But these newly discovered "voyages" have no foundation in the complaint, and are contradicted by plaintiffs' admissions and the conclusive findings of the Federal Maritime Commission.

Thus, the complaint alleges only that repairs to plaintiffs' ships, if and when required, were accomplished "principally" in the United States (J.A. 12), and is totally silent as to any "voyages."

Actually, plaintiff PSI affirmatively asserted before the Federal Maritime Commission that "it does not furnish transportation to and from the United States" (J.A. 103, n. 10).

And this argument was confirmed by the Maritime Commission's decision which specifically found that PSI did "not offer a service between the United States or any of its District or Territories or possessions on the one hand and a foreign country on the other hand" (J.A. 113).

In short, plaintiffs' belated "voyage" assertions on brief not only go beyond their District Court complaint but are belied by the actual facts.

Such baseless assertions cannot at this late date make plaintiffs' "wholly foreign" operations part of the commerce of the United States with foreign nations, nor can plaintiffs slip into "the stream of commerce" their carriage of foreign goods for foreign principals in the Far East interport trade which did "not involve as one terminus any port in a State, District, Territory or possession of the United States" (J.A. 117).

Reminiscent of plaintiffs' prior maneuvers before the Maritime Commission (J.A. 98), these attempts to improve on their District Court complaint simply confirm that plaintiffs' *actual* complaint, which they did *not* seek to amend, cannot meet pertinent Sherman Act jurisdictional tests.

B. None of Plaintiffs' Inapposite Authorities Even Remotely Indicate That Defendants' Challenged Activities With Respect to the Carriage of Foreign Cargo for Foreign Principals Between Foreign Ports Are Within the Reach of the Sherman Act.

Nor are plaintiffs' strained legal assertions of any help to their cause.

Contrary to plaintiffs' broad assertions (A. Br. p. 14), not *one single cited precedent* even remotely indicates "that the acts and practices of [defendants'] giving rise to this action are within the reach of the Sherman Act." In fact:

(1) Plaintiffs' attempt to premise jurisdiction on the American citizenship of the parties, despite the "wholly foreign" target of the alleged conspiracy, ignores the language of the Sherman Act and pertinent precedents thereunder; and

(2) Plaintiffs' quotation of dicta indicating the broad sweep of the Sherman Act in domestic interstate commerce cases has nothing to do with the application of the Act to the foreign-to-foreign interport trade involved here.

(1) Plaintiffs' attempt to premise jurisdiction on the American citizenship of the parties, despite the "wholly foreign" target of the alleged conspiracy, ignores the language of the Sherman Act and pertinent precedents thereunder.

Plaintiffs would now have this Court assume jurisdiction over this "wholly foreign" controversy simply because one of its alleged effects was to arrest vaguely specified domestic operations of American citizens (A. Br. p. 27).

But plaintiffs cannot escape the language of the Sherman Act which limits its reach to commerce "among the several states" or the commerce of the United States "with foreign nations."

Consonant with this language, a settled body of precedent holds that the *target* of the restraint rather than the identity of the aggrieved plaintiff is determinative of Sherman Act jurisdiction.

Thus in *Page v. Work*, interstate newspapers were sued by a plaintiff, also operating a newspaper in interstate commerce, who claimed a conspiracy aimed at local legal advertising. Dismissing the action for lack of jurisdiction, the Court held that "the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." *Page v. Work*, 290 F. 2d 323, 330 (9th Cir. 1961), cert. denied, 368 U.S. 875 (1961).²¹

In short, the text of the Sherman Act and the cases refute plaintiffs' assertion "that a conspiracy among defendants engaged in foreign commerce . . . is proscribed by the anti-trust laws even if the plaintiffs . . . are not themselves in foreign commerce" (A. Br. pp. 19-22).²²

Equally inapposite is *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954). There, jurisdiction under the Robinson-

²¹ Accord, e.g., *Lieberthal v. North Country Lanes, Inc.*, 332 F. 2d 269, 272 (2d Cir. 1964) (conspiracy to arrest construction of bowling alley prevented interstate flow of equipment). See also *Elizabeth Hospital, Inc. v. Richardson*, 269 F. 2d 167, 170 (8th Cir. 1959), cert. denied, 361 U.S. 884 (1959); *Lawson v. Woodmere, Inc.*, 217 F. 2d 148, 149 (4th Cir. 1954); *Hotel Phillips, Inc. v. Journeyman Barbers*, 195 F. Supp. 664, 667-669 (W.D. Mo. 1951), aff'd per curiam, 301 F. 2d 443 (8th Cir. 1962) (all holding that contentions of jurisdiction because supplies are obtained from interstate sources or customers are involved in interstate commerce are "quite lacking in merit." *Lawson v. Woodmere, Inc.*, *supra* at 149).

Thus, plaintiffs' allegations concerning the hiring of American crewmen and "financing, insurance, fuel, supplies, maintenance, and repairs," the "arrangements" for which are alleged to have been made "from" plaintiffs' New York offices (J.A. 12), are simply beside the point where the target of the alleged conspiracy was the carriage of foreign goods for foreign principals between foreign ports.

²² In *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209, 213 (1959), the Supreme Court was concerned with the question whether a restraint on the interstate sale of appliances which interfered "with the natural flow of interstate commerce" was actionable in a private suit when injury to only one plaintiff was alleged. In upholding jurisdiction, the Supreme Court affirmed the principle that the determinative question was not whether the effect of the conspiracy was local but whether interstate commerce was its target. See also, *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (resale price maintenance on gasoline flowing in interstate commerce proper basis for Sherman Act jurisdiction in private action by injured local retailer); *United States v. Frankfort Distilleries*, 324 U.S. 293, 297 (1945) (conspiracy to fix local resale price of alcoholic beverages actionable under Sherman Act where part of larger plan to control flow of liquor in interstate commerce).

Patman Act was sustained on proof that defendant's local New Mexico bread price which had injured plaintiff differed from the price charged for the same bread trucked across state lines from New Mexico to Texas. *Id.* at 116-117.

But plaintiffs' complaint here has no allegation of any illicit activity by the defendants in connection with their carriage of cargo between the United States and foreign ports—*i.e.* in commerce of the United States *with* foreign nations. Rather, the *sole* target of the alleged antitrust conspiracy was the Far East interport trade consisting of the carriage of foreign goods for foreign principals between foreign ports in Taiwan/Thailand and South Vietnam, and the only challenged conduct took place in *that* trade.

Hence, *Mead's Fine Bread* and defendants' overall engagement in United States foreign commerce provide no basis for Sherman Act jurisdiction here. E.g., *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963) (dismissal for lack of jurisdiction where plaintiff claimed actionable price discrimination in local sales of large interstate dairy).

(2) Plaintiffs' quotation of dicta indicating the broad sweep of the Sherman Act in domestic interstate commerce cases has nothing to do with the application of the Act to the foreign-to-foreign interport trade involved here.

Also wide of the mark are plaintiffs' quotations of abstract dicta concerning the reach of the Sherman Act (A. Br. pp. 14-15).

Actually, none of the antitrust cases cited by plaintiffs to support their claims even involve commerce of the United States "*with* foreign nations." Rather, to the extent these cases in fact involved "commerce" issues, they turned on whether various *domestic* activities constituted "commerce" at all, or, if they were "commerce" whether they were *interstate* in nature.

E.g., *Appalachian Coals v. United States*, 288 U.S. 344, 360 (1933) (exclusive agency arrangement for sales of coal in interstate commerce; comment on the "generality and adaptability" of the Sherman Act quoted by plaintiffs (A.

Br. p. 14) referred only to "the essential standard of reasonableness" under which the challenged agreement was upheld): *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932) (involving "sole question" whether the cleaning business in the District of Columbia was "trade or commerce" for Sherman Act purposes);²³ *United States v. South Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944) (domestic insurance business, carried on "among the several states," is "commerce" covered by Sherman Act).²⁴

Thus, no case cited by plaintiffs "resolves" the jurisdictional issue in *this* case in their favor (A. Br., pp. 15-16). That issue remains whether the Sherman Act properly construed comprehends alleged restraints on competition in ocean transportation of foreign goods for foreign principals between foreign ports.

On *this* issue, plaintiffs' Commerce Clause Constitutional cases (A. Br., pp. 15-17) can be of no comfort to them. Chief Justice Marshall's famous definition of commerce of the United States as "commercial intercourse between the

²³ Speculation as to the "broader" nature of the commerce "power when exercised as to foreign commerce" quoted by plaintiffs from *Atlantic Cleaners & Dyers* (A. Br., p. 16) referred only to the *methods*—e.g., embargoes—Congress might adopt to control the United States foreign commerce, not the *subject matter* of this power. 286 U.S. at 434. Likewise *White's Bank v. Smith*, 74 U.S. (7 Wall.) 646 (1869) and *Providence & N.Y. Steamship Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883) (A. Br., pp. 16-17) both involve challenges to particular *methods* of regulating carriers *admittedly* engaged in United States interstate and foreign commerce; upholding Federal Recording Act of 1850 and Congressional power to limit liability of ship-owner to American merchant.

²⁴ Other cases from which plaintiffs extract broad dicta are equally remote from the facts of the Far East interport trade. *United States v. Frankfort Distilleries*, 324 U.S. 293, 297 (1945) (conspiracy to fix local resale price of alcoholic beverages which was "inseparable element" of larger plan to control interstate commerce by boycotting interstate sellers); *United States v. Chrysler Corp.*, 180 F. 2d 557 (9th Cir. 1950) (conspiracy affecting the movement of automobile replacement parts in interstate commerce); *Perey Dairy Co. v. United States*, 178 F. 2d 363, 366 (8th Cir. 1949) (conspiracy to fix retail price of milk moving across state line from Illinois to Missouri); *Utah Gas Pipelines Corp. v. El Paso Natural Gas Co.*, 233 F. Supp. 955 (D. Utah 1964) (attempt to monopolize interstate gas transmission among ten western states).

United States and foreign nations" is indeed fatal to their claim. *Gibbons v. Ogden*, 76 U.S. (9 Wheat) 196 (1824).

Even in the interpretation of the Commerce Clause as applied to domestic activities, the Supreme Court's decision in *Atlanta Motel v. United States*, 379 U.S. 241, 250-251, 255 (1964) upheld the constitutionality of provisions of the Civil Rights Act of 1964, against "states rights" challenges, based on their limited applicability only to "enterprises having a direct and substantial relation to the interstate flow of goods and people."

Nor can plaintiffs find solace in those decisions which apply the law of the flag to on-board conduct and regulation of the internal affairs of the crew (A. Br., p. 18). For as explained in *United States v. Flores*, 289 U.S. 137, 155 (1933), and *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953), such decisions turn on the fiction that a ship is part of the territory of the flag nation. This view in turn represents a general international understanding "among civilized nations that all matters of discipline and all things done on board which affect only the vessel or those belonging to her" should be governed by a single law. 289 U.S. at 158; 345 U.S. at 585.²⁵

But this principle simply does not control whether the Sherman Act's criminal penalties and civil forfeitures extend to the conduct of American carriers in trade solely among foreign nations, which has nothing to do with "matters of discipline" or "things done on board." As the Supreme Court has stressed, in this context the governing principles of international law demand careful restriction of jurisdiction lest "a multiplicity of conflicting and overlapping burdens blight international carriage by sea." *Lauritzen v. Larsen*, *supra* at 581.

²⁵ This principle fully supports and explains applicability of the National Labor Relations Act to the internal affairs of American ships. *Panama E.R. Co.*, 2 NLRB 290 (1936); *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206 (1940) (cited A. Br., pp. 17-18). The Jones Act cases (cited A. Br., p. 18) also involve on-board activities. Moreover, the Jones Act is rooted in the Article III power over cases in admiralty rather than the commerce power. *McKie v. Diamond Marine Co.*, 204 F. 2d 132, 135 (5th Cir. 1953). In fact, *Morris v. United States*, 3 F. 2d 588 (2d Cir. 1924) was a common law action for maintenance and cure.

In sum, therefore, nothing in the Sherman Act, Constitutional, and maritime cases cited by plaintiffs changes the basic and fundamental rule that only activities which directly restrain or substantially affect the commerce of the United States "*with foreign nations*" are covered by the Sherman Act.

Above all, nothing in plaintiffs' strained analogies even remotely suggests that the *facts of this case*, involving the ocean transportation of foreign goods for foreign principals between foreign ports, come within any discernible Sherman Act test.

C. In Particular, Plaintiffs' Vague "National Interest" Test of Sherman Act Commerce Jurisdiction Is Novel and Unsound

In the final analysis, therefore, plaintiffs' case resolves itself into an attempt to have this Court adopt a novel test of Sherman Act jurisdiction which would extend the antitrust laws to trade between foreign nations whenever it has a so-called "real and substantial relation to the national interest" (A. Br., p. 27).

In view of this nation's global commitments, this test could turn the Sherman Act's criminal sanctions into worldwide police regulations, and extend its treble damage provisions into a trap for the unwary who might unwittingly affect some United States "interest" in some far corner of the world.

In the first place, plaintiffs' novel test is not even supported by the *non-antitrust* domestic commerce case from which it is drawn. Apparently, plaintiffs' "test" stems from the Supreme Court's 1966 decision sustaining the constitutionality of the Public Accommodations provisions of the Civil Rights Act of 1964. But even plaintiffs' quotation from the *Atlanta Motel Civil Rights Act* decision (A. Br., p. 16) shows that "the determinative test of the exercise of power by Congress under the commerce clause is simply whether the activity sought to be regulated is 'commerce which concerns more states than one' and has a real and substantial relation to the national interest." 379 U.S. at 255.

Thus, even assuming that this pronouncement might govern the global reach of the Sherman Act, its purport is that the "national interest" test is a supplemental criterion—which comes into play only *after* it is determined that United States commerce "*with foreign nations*" is in fact involved.

Importantly, none of plaintiffs' antitrust cases supports any such vague "national interest" test. In language which plaintiffs pointedly *omitted* from their quotation from the Supreme Court's *Sisal* opinion (App. Br., pp. 23-24), the Court expressly stated that "the fundamental object" of the monopolistic conduct there condemned "was control of both *importation* and sale of sisal and complete monopoly of both *internal and external trade and commerce therein*." 274 U.S. at 276.

The remainder of plaintiffs' antitrust and trade regulation citations (App. Br., pp. 23-25) likewise deal with conduct directly restraining or substantially affecting competition in American import and export trade. See *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) (direct restraint on vanadium exports); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286-287 (1952) (trademark misused in Mexico affected Bulova's reputation both "here and abroad" and "spurious 'Bulovas' filtered through the Mexican border *into this country*"); *Branch v. FTC*, 141 F. 2d 31 (7th Cir. 1944) (export of spurious correspondence courses injured competing American businesses exporting similar courses).

And Judge Walsh's *Grand Jury* decision (cited A. Br. p. 27), which was only a preliminary ruling as to a Grand Jury's jurisdiction to *investigate* conduct to determine *whether or not* restraints on or substantially affecting the commerce of the United States "*with foreign nations*" were involved, states no test of the Sherman Act's reach which does not require facts showing a "substantial anti-competitive effect on our foreign commerce." 186 F. Supp. at 314.

Beyond its defective legal basis, plaintiffs' claim (A. Br., pp. 29-30), that the "national interests" of the United States were "really and substantially affected" by de-

fendants' challenged conduct is simply belied by the actual facts.

Contrary to plaintiffs' implication, no strained and novel Sherman Act ruling from this Court is needed to give AID "power to prevent" overcharges and excess payments (A. Br., p. 28). Since 1949, statutory authority invites the United States Government to recover any such excess payments. See *United States v. Standard Oil Co.*, 155 F. Supp. 121 (S.D.N.Y. 1957), *aff'd*, 270 F. 2d 50 (2d Cir. 1959) (Middle East oil purchases); *United States v. Bloomfield Steamship Co.*, 359 F. 2d 506 (5th Cir. 1966) (overcharges on shipping rates).

Also, by special Congressional enactment in 1955, the United States Government was given express authority to recover money damages for any injury to "its business or property by reason of anything forbidden in the antitrust laws." Clayton Act § 4(A), 15 U.S.C. § 15(A).

Is it not odd, to say the least, that these private plaintiffs now pose as the protectors of the United States government from hypothetical freight "overcharges" (A. Br., p. 29), when the United States itself has never asserted such a claim, after four years of notice since the filing of plaintiffs' Federal Maritime Commission complaint in April 1963?

Surely, if United States interests *had* been adversely affected, neither Maritime Commission Hearing Counsel, who supported in the public interest the dismissal of plaintiffs' administrative complaint, nor the Administrator of AID, who filed an affidavit in the Maritime Commission proceeding on which plaintiffs now rely (J.A. 145), would have sat by for four years waiting for these private plaintiffs to vindicate the public interests of the United States.

Manifestly, unless plaintiffs wish to impugn the motives and vigilance of these public officials, the conclusion is obvious. Whatever interests AID or the United States may have had in the operation of the Far East interport trade were neither infringed nor impaired by the defendants' activities challenged in this case.

Clearly, therefore, the facts of this case furnish no reason to depart from the principle recently applied in a *government* antitrust prosecution; AID financing involvement

does not transform the underlying commerce, which is the crucial question for antitrust purposes. *United States v. Concentrated Phosphate Export Ass'n Inc.*, 1967 CCH Trade, Reg. Rep. ¶ 72,203 (S.D.N.Y. 1967). See also *Report of the Attorney General's Committee to Study the Antitrust Laws* 80 (1955) ("mere financing by Americans of manufacturing, mining or other local activities abroad does not come within the Sherman Act"); and the determination of the Maritime Commission (J.A. 117) that the foreign-to-foreign shipping trade involved here constituted "local activities abroad" not converted "into the foreign commerce of the United States" by AID financing.

CONCLUSION

This Court need look no further than the complaint in order to affirm the District Court's determination that the complaint does "not state facts constituting a cause of action under the Sherman Antitrust Act." Accepting all the facts alleged as true, the *only* purported basis of jurisdiction lies in plaintiffs' novel and untenable concepts of the Sherman Act's reach over foreign-to-foreign transportation.

No basis exists for permitting plaintiff to pursue this protracted litigation further. The complaint states plaintiffs' case in its most favorable possible light. No amendment has been sought, or could be made, to show unlawful activities affecting the commerce of the United States *with* foreign nations, in the face of factual findings made by the Federal Maritime Commission after 23 months of litigation.

For, even assuming *arguendo* that in some *other* antitrust case, brought by the Department of Justice or by a private party, concerted activities in ocean carriage *between foreign ports* might be charged and proved to have the substantial adverse effects on the commerce of the United States "*with* foreign nations," in this case no such effects *were* or *could* be alleged.

In any event, the critical "relationship of the Far East interport trade to the overall activities of the parties, the extent of AID involvement and control and the impact of [defendants'] activities on the United States and its foreign

commerce," which plaintiffs suggest as key issues here (A. Br., p. 38), have been fully adjudicated in the unappealed Maritime Commission proceedings.

Surely this Court should not stretch the Sherman Act beyond the bounds set by seventy-seven years' precedents, where these private plaintiffs pose as the protectors of the public interest, when neither AID nor any other U.S. government agency has ever questioned defendants' challenged Far Eastern transportation activities despite nearly four years' notice of plaintiffs' claims.

* * *

Thus, there is no basis in fact, law, or policy to permit these private plaintiffs to relitigate in this jurisdiction's crowded District Court those facts and issues with respect to foreign-to-foreign trade between Taiwan/Thailand and South Vietnam as to which they have already had a full hearing and determination by the Federal Maritime Commission which they failed to appeal.

In light of the recognized policy to avoid "long and expensive litigation productive of nothing", this case was clearly an appropriate one "for even a sparing use of summary procedures," *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32, 35, 365 F. 2d 965, 968 (1966); *Bond Distributing Co. v. Carling Brewing Co.*, 32 F.R.D. 409, 415 (D. Md. 1963), *aff'd per curiam*, 325 F. 2d 158 (4th Cir. 1963).

Accordingly, the District Court's judgment should be affirmed.

Respectfully submitted,

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United States Lines Company;
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APPENDIX**Statutes Involved****Sherman Antitrust Act**

Act of July 2, 1890, c. 647, § 1, 26 Stat. 209, 15 USC § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 2, 26 Stat. 209, 15 USC § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Act of July 2, 1890, c. 647, § 3, 26 Stat. 209, 15 USC § 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Clayton Antitrust Act

Act of October 15, 1914, c. 323 § 4, 38 Stat. 731, 15 USC § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Shipping Act of 1916

Act of September 7, 1916, c. 451, § 1, 39 Stat. 728, 46 USC § 801:

When used in this chapter:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnish-

ing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

The term "documented under the laws of the United States", means "registered, enrolled, or licensed under the laws of the United States."

Act of September 7, 1916, c. 451, § 14a, as added June 5, 1920, c. 250, § 20, 41 Stat. 996, and amended, 46 USC § 813:

The Federal Maritime Board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property—

- (1) Has violated any provision of section 812 of this title, or
- (2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 812 of this title, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

If the Board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the Board shall thereupon certify such fact to the Commissioner of Customs. The Commissioner of Customs shall thereafter refuse such person the right of entry for any ship owned or

operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the Board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated.

Act of September 7, 1916, c. 451, § 15, 39 Stat. 733, 46 USC
§ 814:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board.



REPLY BRIEF FOR APPELLANTS

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,173

PACIFIC SEAFARERS, INC., ET AL., *Appellants*,

v.

PACIFIC FAR EAST LINE, INC., ET AL., *Appellees*.

**Appeal From Order and Judgment of the United States District
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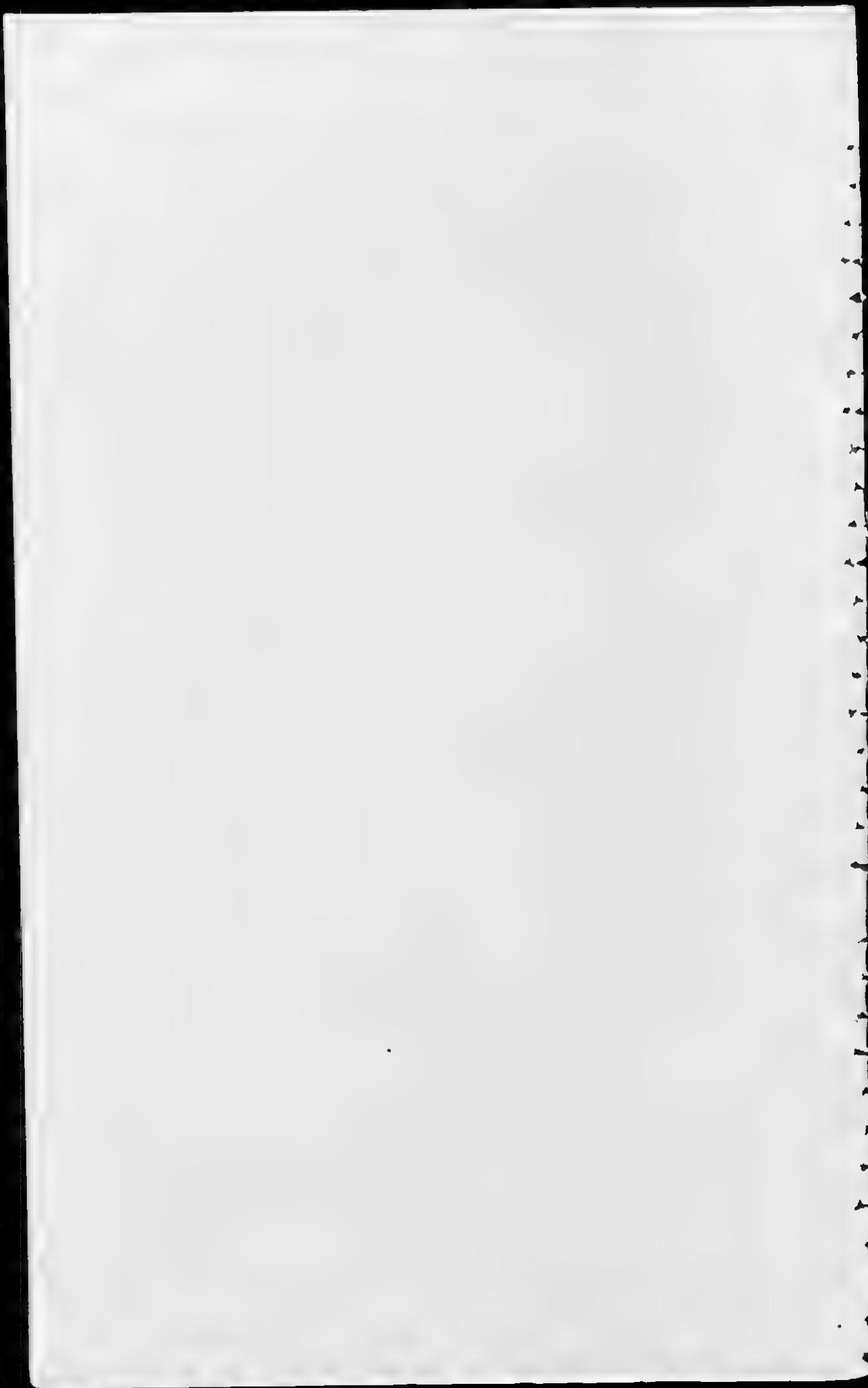
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v.

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**Appeal From Order and Judgment of the United States District
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REPLY BRIEF FOR APPELLANTS

1. **Appellees' Arguments to the Contrary Notwithstanding, the Complaint Alleges a Conspiracy in Restraint of the Foreign Commerce of the United States Within the Meaning of the Sherman Act.**

The first comment to be made about the two lengthy briefs filed herein on behalf of appellees is that they have almost completely disregarded the two most recent decisions of the Supreme Court dealing with the foreign commerce aspects of the Sherman Act. The most recent of these is *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), where the relationship between the Shipping Act of 1916 and the Sherman Act was at issue.

Defendants in that case contended that the two acts were co-extensive in scope and that all antitrust regulation of the shipping industry was repealed by the Shipping Act. This argument was squarely rejected. The Court held, instead, (1) that it had long been recognized that the antitrust laws represent a fundamental national economic policy from which no industry will be exempted absent specific Congressional requirements to that effect, (2) that the Shipping Act of 1916 did not repeal all antitrust regulation of the industry but gave it only a limited exemption from the antitrust laws, and (3) that agreements among shipping lines that had not been subjected to examination by, and had not received the approval of, the Federal Maritime Commission were subject to the antitrust laws. Since the agreements before the Court in the *Carnation* case had not been approved by the Maritime Commission, they were held to be violative of the Sherman Act.

Substantially the same argument that was rejected by the Supreme Court in the *Carnation* case is being made by appellees here. They say "it is inconceivable that Congress could have regarded the Sherman Act as applicable" to an area not reached by the Shipping Act. Such an argument, coming as it does after the *Carnation* decision, can only be made if the holding in that case is completely disregarded.

The position of appellees as to the scope of the Sherman Act is not helped by references to what members of the Congress may have said about it when the Shipping Act was under consideration in 1916. In *United States v. Wise*, 370 U.S. 405 (1962), the Supreme Court held that the legislative history of the Clayton Act does not provide an appropriate guide for construing the Sherman Act. The Court said (at 414):

How members of the 1914 Congress may have interpreted the 1890 Act is not of weight for the purpose of construing the Sherman Act [Citing cases].

A comparison of the statutory language of the two acts shows that the foreign commerce scope of the Shipping Act is much more limited than that of the Sherman Act. By Section 1 of the Sherman Act, every contract, combination or conspiracy "in restraint of trade or commerce among the several states, or with foreign nations" is declared to be illegal. As appears from the cases cited in our main brief, the Supreme Court and the lower federal courts have held on numerous occasions that, by this language, Congress exercised its full constitutional power under the Commerce clause. As the Court put it, in the Sherman Act Congress "left no area of its constitutional power unoccupied; it exercised all the power it possessed."¹

In the Shipping Act, however, Congress did not exercise all of the power which it possessed over foreign commerce. The Act, by its terms, is applicable to "common carriers by water engaged in the foreign and domestic commerce of the United States." The term "common carrier by water in foreign commerce" is defined as a common carrier engaged in the transportation by water of passengers or property "between the United States . . . and a foreign country, whether in the import or export trade." 46 U.S.C. Sec. 801. The prohibitions against rebating, the use of "fighting ships" and other discriminatory acts and practices are applicable only to the "transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country." 41 U.S.C. Sec. 812.

Thus, the jurisdiction of the Federal Maritime Commission over carriers by water engaged in foreign commerce is limited to those carriers which transport passengers or

¹ These oft-repeated holdings as to the scope and extent of the Sherman Act can not be lightly dismissed, as appellees seek to do, by referring to them as "dicta".

property between ports of the United States and ports in a foreign country. There is no such limitation in the Sherman Act; and there is no such limitation in the Commerce clause of the Constitution. As we pointed out in our main brief (p. 33), this difference in the language of the two statutes was urged upon the Federal Maritime Commission by appellees in this action as a reason why the Commission should refuse to entertain jurisdiction over the administrative proceedings brought there by Pacific Seafarers. At the pretrial conference before the Hearing Examiner in that proceeding, Mr. Ransom (who also appears as counsel for appellees in this action) contended that antitrust issues were not properly before the Commission because (Tr. 85):

“The foreign commerce of the United States”, in my opinion, is bandied about very loosely here. That’s Sherman Act language, not Federal Maritime Shipping Act language. Shipping Act language is transportation of commodities from the United States to a foreign country and from a foreign country to the United States, not “the foreign commerce of the United States.”

Having prevailed on this issue before the Maritime Commission, counsel for appellees now seek to reverse their field and urge this Court to hold that a finding of lack of Commission jurisdiction under the Shipping Act constitutes a bar to relief under the Sherman Act. In light of the decision of the Supreme Court in the *Carnation* case, this they may not do.

That the power of Congress over foreign commerce is nothing like as limited as appellees urge this Court to hold is further demonstrated by Section 14a of the Shipping Act, 46 U.S.C. Sec. 816, discussed at page 28 of appellees’ brief. That section authorizes the Maritime Commission to bar *foreign carriers* from United States ports if they are parties to an agreement in respect to transportation of passengers or property *between foreign ports*

that excludes American flag common carriers by water from admission upon equal terms. The inclusion of this provision in the Shipping Act is a clear indication that foreign-to-foreign commerce is not outside the power of Congress under the Commerce clause. It further demonstrates that the term "foreign commerce" is not limited, as appellees contend, to imports, exports, or transportation to or from the United States.

Under the quoted section, if a group of *foreign* shipping lines had entered into a conspiracy to drive appellants out of the shipping business in the Far East, relief could be obtained as therein provided. If a group of *American* shipping lines enter into a similar conspiracy, appellees maintain that nothing can be done about it. And the reason they give for this is that Congress so intended. Appellants submit that no such intent can or should be attributed to the Congress.

The other recent Supreme Court case which appellees have very largely ignored in their briefs is *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In that case the Court stated in clear and unambiguous language that antitrust cases should be decided by looking at the picture as a whole, and not just by looking at the various bits and pieces that go to make up that whole. The Court said (370 U.S. at 699):

In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. "... [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. . . ."

Despite this clear admonition, appellees' foreign commerce argument is based upon a dismemberment and compartmentalization of the conspiracy. The vessels of appellees which participated in the Far East interport trade

started their voyages from ports in the United States with cargo which originated in the United States. They returned to the United States with cargo which originated in the Far East. Along the way the vessels unloaded some, but not all, of the original cargo at intermediate foreign ports and picked up other cargo at those ports. But some of the cargo which originated in the United States was carried all the way to the end of the line; and some of the return cargo which originated at the end of the line was carried all the way back to the United States. As to the cargo which originates here or ends here, there can be no question that the vessels are engaged in foreign commerce, no matter how that term is defined. Can it be said that the vessels are any the less engaged in foreign commerce because they drop off and pick up cargo along the way?

The complaint alleges that appellees, being engaged in foreign commerce, combined and conspired to drive a competitor out of business. Appellees seek to avoid the effect of their acts by dismembering the conspiracy and compartmentalizing the cargo. But the interport business can not be separated out in that way. In other words, so far as appellees are concerned there is no such thing as a separate business limited to the interport trade. That business was part and parcel of their overall service between the United States and the Far East; or as the complaint describes it, it was an "integral" part of such service. The conspiracy charged in the complaint was carried out by use of the instrumentalities of foreign commerce, i.e., the vessels of appellees which were clearly engaged in such commerce. And, as we show in our main brief, a conspiracy among a group of competitors who are engaged in commerce is not immunized from the Sherman Act by reason of the fact that the victim of the conspiracy competes for only part of that commerce.

The suggestion that the *Continental Ore* decision supports appellees' import-export theory finds no support in

the language of the opinion in that case. The case was tried to a jury, which returned a verdict for the defendants. The Court of Appeals affirmed on the ground that there was insufficient evidence to sustain a verdict for plaintiff and that the trial court should have directed a verdict for defendants. The Supreme Court held that this was wrong and that there was sufficient evidence to go to the jury. Instead of ordering the jury's verdict reinstated, the Supreme Court sent the case back for a new trial because of the refusal of the trial court to admit evidence as to plaintiff's exclusion from the Canadian market. The Court said (at 707):

To subject [the defendants] to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purpose of the Sherman Act . . .

Since our decision concerning the alleged loss of Continental's Canadian business will in any event require a new trial of the entire case in view of the clear interconnection between the Canadian and domestic issues, we shall remand the case to the District Court for further proceedings.

Thus, the basis for the reversal was the conspiracy to eliminate a competitor from the Canadian market, not the source of the competitor's supplies or where it obtained its raw materials.

The cases cited by appellees do not support their argument that the Sherman Act is concerned only with imports and exports. Indeed, a number of those cases hold exactly to the contrary. For example, in *In Re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (Dist. of Col. 1960) Judge Walsh rejected a contention that the carriage of cargo from ports in one foreign country to ports in another foreign country pertains to matters out-

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side the territorial jurisdiction of the United States and therefore is not within the Sherman Act, with the following comment (at 313) :

Certain of the movants claim that the Sherman Act scope of "trade and commerce . . . with foreign nations" is limited to the export-import product of the United States. However, the report of the Attorney General's National Committee to Study the Anti-trust Laws of March 31, 1955, pp. 77-80, disagrees with such a restrictive construction of the Act.

The precedential value of the decision as to the reach of the Sherman Act is not weakened by the fact that the grand jury investigation did not result in an indictment.

Another case relied on by appellees is *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D.C. Mass. 1950); but the holding in that case as to the scope of the Sherman Act is exactly the opposite of what appellees say it was. What the court there held was that an agreement among American manufacturers controlling four-fifths of the export trade in coated abrasives to establish jointly-owned factories abroad and to ship to other countries from those factories rather than from the United States was a combination in restraint of trade violative of the Sherman Act. The Court said (at 961) :

The restraint has consisted in the effect of defendants' jointly-owned factories' precluding their American competitors from receiving business they might otherwise have received from the markets served by these jointly-owned foreign factories.

And later in the opinion (at 963) :

If this reasoning be correct, then the same logic would condemn defendants' conduct in using their factories in England, Canada and Germany to supply temporarily or permanently consumers in Australia, New Zealand, parts of the British Empire, European countries or other areas.

The brief filed on behalf of appellee Farrell Lines, Inc. places great reliance on *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), as being dispositive of the foreign commerce issues in this case. The *Yellow Cab* case is said to stand for the proposition that the determinative jurisdictional factor in a Sherman Act case involving the transportation industry is where the journey begins and where the journey ends. This is not a correct reading of the *Yellow Cab* decision. The Court's opinion in that case is divided into three parts. The first part deals with an alleged combination and conspiracy in restraint of trade in the sale of motor vehicles for use as taxicabs in four named cities. This combination was held to fall within the ban of the Sherman Act even though it was alleged to be effective in four separate cities rather than in the nation as a whole. The second part of the opinion deals with an alleged combination and conspiracy among the defendants not to compete for the business of carrying passengers between railroad stations in the City of Chicago. The trial court had dismissed this charge on the theory that only intrastate commerce was involved. The Supreme Court reversed, holding that such transportation was part of the stream of interstate commerce even though the journey between stations began and ended in the same city. The Court said (at 229):

That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed it is an integral step in the interstate movement.

The third part of the opinion deals with the applicability of the Sherman Act to the local taxicab business in Chicago. This business was held to have only a casual and incidental relationship to interstate commerce, in view of the fact that the carriage of passengers to and from railroad stations represented but a small part of the total local taxicab business. The Court was careful to point out, however, that it was not deciding that all conspiracies among local cab drivers are so unrelated to interstate com-

merce as to fall outside the reach of the Sherman Act. In this connection the Court said (at 233):

A conspiracy to burden or eliminate transportation of passengers to and from a railroad station where interstate journeys begin and end might have sufficient effect upon interstate commerce to justify the imposition of the Sherman Act or other federal laws resting on the commerce power of Congress.

It is thus clear that *Yellow Cab* does not support appellees' position. Insofar as the decision dealt with the local taxicab business, it is largely limited to the particular facts of the case. More importantly, the fact that the Parmelee Company, which carried passengers between the railroad stations within the City of Chicago, was held subject to the Sherman Act, demonstrates that the determinative factor as to what constitutes interstate commerce is not where the journey begins and where it ends, since the Parmelee journeys always began and ended within Chicago.

No more can it be said that whether the foreign commerce of the United States is affected can be determined by where a journey begins and where it ends. Just as the Parmelee journeys within the City of Chicago were integral parts of interstate commerce, so in the instant case are the Far East interport journeys an integral part of the foreign commerce of the United States.

Another case cited by appellees, *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99 (2 Cir. 1951), likewise falls short of the mark. There, in a copyright infringement suit, defendant contended that relief should be denied plaintiff on the ground of "unclean hands" because of plaintiff's alleged participation in an illegal price-fixing scheme in Great Britain and Ireland. The Court rejected this defense, saying (at 106):

We have here a conflict of policies: (a) that of preventing piracy of copyrighted matter and (b) that of enforcing the antitrust laws . . . As the plaintiffs' infraction of the antitrust laws is doubtful and at most

marginal, we think the enforcement of the first policy should outweigh enforcement of the second.

How this ruling helps appellees in this case is hard to comprehend.

Nor is anything of value added to the discussion by appellees' reference to cases such as *Lieberthal v. North Country Lanes, Inc.*, 332 F. 2d 269 (2 Cir. 1964), holding that an alleged conspiracy among local bowling alley operators in Plattsburgh, New York, was not within the Sherman Act, or *Hotel Phillips, Inc. v. Journeyman Barbers*, 195 F. Supp. 664 (WD Mo. 1961), aff'd, 301 F. 2d 443 (8 Cir. 1962), holding that a price-fixing agreement among the barbers in Kansas City was not within the Act. A detailed discussion of the other cases cited by appellees on the commerce issue would unduly prolong this brief. Suffice it to say that none of them support the proposition that the victim of a conspiracy among those engaged in interstate or foreign commerce may not obtain Sherman Act relief unless he, himself, is engaged in that commerce. The cases cited in our main brief clearly establish that this is not so.

Thus, the plaintiff in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), was a retail oil dealer whose business was not in interstate commerce. The plaintiff in *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), was a retail appliance dealer in San Francisco who was not engaged in interstate commerce. The plaintiff in *Radovich v. National Football League*, 352 U.S. 445 (1957), was a professional football player who was obviously not engaged in interstate commerce. And the plaintiff in *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954), was a local baker in Santa Rosa, New Mexico, none of whose activities were interstate in character. Yet each of these plaintiffs was permitted to recover because of the fact that those responsible for the injury were engaged in interstate commerce. By the same token, as appellees in this case were clearly engaged in foreign commerce, appellants are en-

titled to proceed against them under the Sherman Act whether or not their own activities fall within the definition of foreign commerce.

This is not to suggest that we are withdrawing in the slightest from the position taken in our main brief that (1) an American flag vessel is engaged in foreign commerce within the meaning of the Sherman Act even though it operates solely between foreign ports and (2) the regular and continued contacts of appellants' vessels with the mainland were such as to bring them within the Sherman Act definition of foreign commerce in any event. As is pointed out in our main brief (pp. 16-19), numerous congressional enactments under the Commerce clause are applicable to American flag vessels wherever they may be. No valid reason has been suggested why the Sherman Act should be construed differently.

2. Appellees' Arguments to the Contrary Notwithstanding, the National Interest of the United States Was Clearly Involved.

The complaint in this action alleges that the conspiracy among appellees had for its purpose the elimination of appellants as competitors of appellees in the carriage of AID cargoes in the Far East, the funds for which were provided by the United States Government. Appellees seek to downgrade the force and effect of this allegation with the assertion that AID acted only in some undefined financing capacity in the matter.. But AID was far more than a mere financier.

In his recent opinion in *United States v. Concentrated Phosphate Export Association*, 1967 CCH Trade Reg. Rep. ¶ 72,203 (S.D.N.Y. Sept. 11, 1967), Judge Ryan gave detailed consideration to the role of AID, under its Procurement Regulations, in relation to the shipment of phosphate from this country to Korea. He concluded as follows:

We also do not accept or agree with defendant's argument that AID was but an incidental party to

the transaction—no more than the usual financing institution found in international transactions where there are problems of currency exchange. AID was at the center of the transactions and it was the force which initiated, directed, controlled and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transaction, particularly by the supplier who looked to [it] for payment and obligated itself to conform to its requirements and conditions if he was to receive payment.

Judge Ryan's findings as to the role of AID in the phosphate case were made after a full trial on the merits, whereas this case is before the Court for disposition on the pleadings. The fact is, however, that the identical AID Procurement Regulations which were applicable in the phosphate case are also applicable here. The Bell affidavit, which is part of the record before this Court, makes specific reference to AID Regulation 1 (J.A. 146), and further states (J.A. 145):

The procurement and shipment of commodities financed by A.I.D. in the trade between the aforementioned countries [Taiwan, Thailand and South Vietnam] is subject to A.I.D. procurement policies.

A trial on the merits would readily demonstrate that the procurement policies referred to in the Bell affidavit were the identical procurement policies considered by Judge Ryan in his phosphate opinion. Further evidence that AID's role was more than that of a mere financier is found in the allegations of Paragraph 42B of the complaint in this action. It is there alleged that appellees succeeded in obtaining a directive from the Director General of Commerce of South Vietnam limiting all future AID cement shipments to liners operated by members of AFBO and that AID countermanded this directive, stating that AID recognized no distinction between conference and non-conference carriers (J.A. 14). A mere financier would

obviously have no interest in which type of carrier transported the cement.

What Judge Ryan said about AID in the phosphate case is equally true here. Here, as there, AID was at the center of the transactions and was the force which put them in motion.

Even if the role of AID were much more limited than it is and than Judge Ryan found, it is by no means clear that the Sherman Act would not come into play. At p. 26 of their brief, appellees quote from the Report of the Attorney General's National Committee to Study the Anti-trust Laws in support of their position. But the quotation is completely out of context. The full text of what the Committee said on this issue is as follows (pp. 79-80):

On this aspect, the Committee therefore concludes that the words "trade and commerce . . . with foreign nations" should be construed broadly to include not only the import and export flow of finished products, their component parts and adjunct services, but also, as in domestic commerce, capital investment and financing. So interpreted, foreign commerce would also comprehend all types of industrial property rights in patents, trademarks, trade secrets and know-how and other confidential technological information. In the absence of requisite effects on this country's "trade or commerce . . . with foreign nations", however, it is clear that the mere financing by Americans of manufacturing, mining or other local activities abroad do not come within the Sherman Act. [Emphasis supplied]

As pointed out above, AID's activities constituted much more than "mere financing", and, indeed, AID would have been the proper party to sue appellees for refunds in the event there had been overcharges on the freight. *United States v. Standard Oil Co. of California*, 155 F. Supp. 121 (S.D.N.Y. 1957), aff'd, 270 F. 2d 50 (2 Cir. 1959).

Missouri v. Stupp Bros. Bridge & Iron Co., 248 F. Supp. 169 (W.D. Mo. 1965), cited by appellee Farrell Lines (at

p. 43) is not to the contrary. What was there held was that the State of Missouri was not an improper party plaintiff in an action for damages arising out of the Federal interstate highway program where the State had put up part of the money. As the opinion points out, the Federal government will be entitled to share in the recovery to the extent of its proportionate contribution to the program. The clear import of the opinion is that if the Federal government had put up all the money, it would have been entitled to the full recovery and would have been the party entitled to bring the suit. In a very recent opinion relating to the same case, the Comptroller General held that the Federal Highway Administration was entitled to a pro-rata share of the amount received by the State in settlement of its claim. 36 U.S. Law Week 2244 (Oct. 24, 1967).

In short, the involvement of AID was such as to involve the national interest of the United States. AID was indispensable to the entire situation. Without AID there would have been no transportation of cement and fertilizer; if there had been it would not have been limited to United States-flag vessels. Indeed, but for AID appellees would have felt no need to combine and conspire to drive appellants out of business—the business would in all likelihood have gone to foreign-flag vessels which operate at lower rates.²

² By referring to the rights of the government to proceed against appellees under facts comparable to those present here, appellants are by no means seeking to act as protectors of the United States government. We have no doubt of the ability of the government to take care of itself. The point we make is that under *Steele v. Bulova Watch Co.*, 334 U.S. 280, 285 (1952), the commerce scope of the Sherman Act is the same whether the suit be brought by the government or by a private litigant. If there is no jurisdiction under the Sherman Act in a suit brought by the appellants, there would likewise be no jurisdiction if suit were instituted by the government whether for the recovery of overcharges or for other relief. Therefore, reference to the rights of the government in a comparable situation is both appropriate and relevant to a determination of the issue in this case.

3. The Doctrine of Collateral Estoppel Is Inapplicable.

Appellees argue that the Maritime Commission's determination that it lacked jurisdiction under the Shipping Act, and the findings made by the Commission in that regard, collaterally estop appellants from bringing this Sherman Act complaint. Appellees' argument is wholly misplaced.

To the extent that the Commission's findings are truly findings of fact, there can be little dispute. The Commission found, for example, that appellant "PSI operates a common carrier service with American flag vessels in the Taiwan-Thailand/South Vietnam trade" (JA 113). True. And that cargoes carried by PSI originated in one foreign port and were destined to another (JA 114). For purposes of this discussion this may also be accepted as true. As shown in our main brief, there is nothing in such findings that denies appellants' valid cause of action under the antitrust laws.

For this reason appellees place their basic reliance upon the Commission's finding that foreign commerce was not here involved. But this is not so much finding of fact as it is conclusion of law. And even were it to be regarded as a mixed question of law and fact, it must be viewed in the context in which the Commission wrote and in which it was authorized to speak. That context, the only context in which the Commission could speak, was the Shipping Act, not the Sherman Act. The Shipping Act, the source of the Commission's jurisdiction, defines a common carrier in foreign commerce, as the Commission itself noted (JA 116), as

"a common carrier . . . engaged in the transportation by water of passengers or property between the United States . . . and a foreign country, whether in the import or export trade . . ."

Within this context, and only within this context, the Commission found no foreign commerce "For the simple reason

that the trade does not involve as one terminus any port in a State, District, Territory or possession of the United States." (JA 117). Since the Commission thus found no foreign commerce within the meaning of the Shipping Act, that determined that the Commission lacked jurisdiction of the subject matter and ended the proceeding.

Appellees seek to turn this decision into a holding that the conspiracy alleged in the complaint was not in restraint of trade or commerce "with foreign nations" within the meaning of the Sherman Act. They wholly ignore that the foreign commerce definition of the Shipping Act, speaking in terms of actual transportation from a point in this country to a point in a foreign country, or vice versa, is far more limited than the foreign commerce concept as used in the Sherman Act. They ignore that the Sherman Act concept of foreign commerce—as broad as the Constitution's Commerce clause itself (see our Main Brief, 14-15)—was not before the Maritime Commission, could not properly have been before the Commission, and was not passed upon by the Commission. But appellees cannot, by ignoring these huge gaps—indeed, chasms—in their argument, close the gaps or make them go away. Nor can the gaps be covered over with appellees' inapplicable talk of "collateral estoppel."

For even the cases cited by appellees hold only that an earlier action "precludes a new adjudication of the question actually decided, *although it does not 'bar the cause of action.'* *Mellen v. Hirsch*, 4 Cir., 171 F. 2d 127." (Emphasis supplied. The emphasized portion was entirely omitted from the sentence as quoted in appellees' brief, p. 34.) *Estevez v. Nabers*, 219 F. 2d 321, 324 (C.A. 5). The most the Maritime Commission decided or could have decided was that it lacked jurisdiction because the Shipping Act definition of foreign commerce—i.e., actual transportation between the United States and a foreign country—was not met. Appellants do not seek a new adjudication of that question. We seek adjudication of the

question as to whether the conspiracy alleged in the complaint offended the Sherman Act with its far broader concept of commerce with foreign nations.

Likewise, in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, relied upon by appellees, the question previously decided was that Sunshine's coal was bituminous within the meaning of section 17(b) of the Bituminous Coal Conservation Act of 1937, and this subjected Sunshine to a specified tax. In the second round of Sunshine's litigation with the Government, the Supreme Court held only that Sunshine could not "raise the identical issue" as to whether its coal was bituminous under the self-same section 17(b), "since its purpose is to enjoin collection of the self-same tax." 310 U.S. at 402. This is far from holding that the Maritime Commission's decision as to its want of jurisdiction under the Shipping Act, with its relatively narrow definition of foreign commerce, bars appellants from alleging restraint over foreign commerce within the broader ambit of the Sherman Act.³

Appellees also cite *Baltimore & O. R. Co. v. New York, N.H. & H.R. Co.*, 196 F. Supp. 724 (SD NY), in support of their position. There the Court found the parties "collaterally estopped from again litigating" matters that had properly been before the Interstate Commerce Commission and as to which the Commission had made "a factual determination of specific acts peculiarly within its expertise" (196 F. Supp. at 745). Even more pertinent is what the Court had to say on another aspect of the same group of cases (196 F. Supp. at 747):

³ *Art Metal Construction Co. v. United States*, 82 Ct. Cl. 666, 13 F. Supp. 756, is equally inapposite. Cited by appellees for the proposition that lack of jurisdiction does not inhibit application of collateral estoppel, it is noteworthy that the Court of Claims specifically found (1) that no reference was made in the earlier *Art Metal* litigation to a want of jurisdiction and (2) that the issues in the earlier litigation

"are the same issues that are presented by plaintiff's petition to this Court."

82 Ct. Cl. at 670; 13 F. Supp. at 758.

It is clear that while the defendants raised the anti-trust question in their pleadings and their briefs, based on the same conduct as is here alleged, the District Court's opinion [in an earlier case] was concerned with the [Interstate Commerce] Commission's jurisdiction to establish the rates. It never considered the question of antitrust violation; . . . it is clearly neither collateral estoppel nor res judicata.

So in the instant case the Maritime Commission was concerned with its jurisdiction under the Shipping Act and never considered antitrust violations or Sherman Act jurisdiction—which would have been far beyond the scope of the Commission's authority. Clearly, then, there was neither collateral estoppel nor res judicata regarding Sherman Act jurisdiction and violations.

4. The Doctrine of Primary Jurisdiction Is Likewise Inapplicable.

Appellees' argument regarding primary jurisdiction is no more in point. Appellees argue (Br. p. 37) that "had appellants filed the instant suit *de novo*, the District Court would no doubt have stayed it pending the completion of precisely the same administrative proceeding which *has already occurred in this case.*" Indeed, it is conceivable that the district court might have done just that, had appellants not already been to the Maritime Commission, but if it had, the Commission could have done no more than it has already done, i.e., find that it was without jurisdiction of the matter. That would have left appellants precisely where they are now, asserting their rights under the antitrust laws in court. For appellants' "rights . . . under the antitrust laws are entirely collateral to those which [they] sought under the Shipping Act." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 224. We do not suggest that appellants might have recovered under both the Shipping Act and the antitrust laws, but neither "primary jurisdiction" nor any other doctrine invoked by appellees denies antitrust recovery to appellants.

because they were unable to get relief under the Shipping Act due to its narrower scope and the Commission's consequent want of jurisdiction to determine the matter.

The primary jurisdiction rule says merely that a claimant in a regulated industry must *first*, i.e., before going to court, seek relief from the administrative regulator of that industry. But appellants here complied with and exhausted this requirement, only to be told that administrative relief was lacking for want of jurisdiction. As this Court pointed out in *S.S.W., Inc. v. Air Transport Ass'n. of America*, 89 U.S. App. D.C. 273, 191 F. 2d 658, *cert. denied*, 343 U.S. 955:

The [Civil Aeronautics] Board, may, of course, ultimately determine that it lacks jurisdiction over certain phases of the complaint. In that event, there will be no conflict of authority between antitrust laws and specific statute and jurisdiction will remain in the District Court to deal with such matters. But, as we have indicated, that cannot be known until the Board has had an opportunity to act on these allegations. (191 F. 2d at 665).

Thus, appellants in this case went first to the Maritime Commission, as the claimant had *not* done in the *S.S.W.* case, and the Commission determined that it lacked jurisdiction over the appellants' complaint. In those circumstances, as this Court held in *S.S.W.*, jurisdiction remained in the district court to deal with appellants' claim. The Supreme Court, in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, settled that where relief sought in a regulated industry situation is not a matter subject to the jurisdiction of the regulatory commission, jurisdiction remains in the courts to grant the appropriate relief—specifically, in the *Georgia* case, relief under the antitrust laws.

The cases cited by appellees fail to support their primary jurisdiction argument as applied to the instant case. One of those cases is the *S.S.W.* case from which we have quoted *supra*. *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, while stating the primary jurisdiction rule,

was actually a proceeding to review a decision of the Federal Maritime Board. *Far East Conference v. United States*, 342 U.S. 570, ordered dismissal of an antitrust action on the ground of the primary jurisdiction of the Federal Maritime Board to which the parties had *not*, as distinguished from the instant case, initially resorted.

United States v. Western Pacific R. Co., 352 U.S. 59, cited by appellees, is merely another case where the Court upheld the primary jurisdiction of the regulatory agency, the Interstate Commerce Commission, to which, again, the claimant railroads had *not*, as distinguished from the instant case, initially resorted. *Western Pacific*, incidentally, held exactly the opposite of appellees' statement of the case at pages 36-37 of their brief. In showing that primary jurisdiction is a practical and flexible rule and not a rigid abstraction, the Court said (at 69):

By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions [previously] laid down . . . which call for decision based on the particular facts of each case. Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it.

The appellees' cases thus merely show that where a regulatory agency has primary jurisdiction and the claimant has brought suit without first resorting to that agency, the Court should either dismiss the complaint or defer further action until the regulatory agency has had opportunity to pass upon the matter. There are no cases holding that where a claimant, as in the instant case, has initially sought relief from the regulatory agency and has been rebuffed by a determination of lack of jurisdiction, he is still barred from seeking relief in the courts by some doctrine of "primary jurisdiction." On the contrary, this Court held in *S.S.W., supra*, that if the ad-

ministrative agency "ultimately determine[s] that it lacks jurisdiction . . . there will be no conflict of authority between the antitrust laws and specific statute and jurisdiction will remain in the District Court . . ."

In short, if the regulatory agency has no jurisdiction of the matter, it has no primary jurisdiction except for the limited purpose of determining its own jurisdiction.

5. The Maritime Commission Being Without Jurisdiction, the Findings of Its Hearing Examiner on the Merits of the Controversy Are Without Effect.

As they did in the court below, appellees here try to argue their case on the basis of findings of fact made by the Maritime Commission's Hearing Examiner. One-third of their statement of the case is devoted to those findings and a half-page footnote at page 37 of their brief goes into them further. They say we are wrong in arguing in our main brief, pp. 34-36, that the Examiner's findings should be disregarded and treated as a nullity. In support, they cite only *Universal Camera Corp. v. National L.R. Bd.*, 340 U.S. 474—for the proposition that weight should be given to the findings of an examiner who has "lived with the case." We do not argue with this variation of the substantial evidence rule. Like the flowers that bloom in the spring, however, it has nothing to do with the case. *Universal Camera* involved no question of the Labor Board's jurisdiction. It simply involved the question of whether a Board order was supported by substantial evidence and the weight to be given the examiner's report in this regard. The Supreme Court did not hold that the examiner's findings were entitled to be given weight even if the Board lacked jurisdiction.

Appellees ignore the gist of the argument in our main brief, pp. 34-36, that a court's findings on the merits are a nullity where the court has no jurisdiction. *Rowe v. Nolan Finance Co.*, 79 U.S. App. D.C. 35, 142 F. 2d 93

(1944). They cavalierly ignore what this Court there held and what other courts have held in the cases we cited at pages 35-36.

If, as the cases hold, (1) a court's merit findings go for naught where there is lack of jurisdiction and (2) the findings of an administrative agency which has no jurisdiction are likewise void, *a fortiori* the merit findings of the Maritime Commission's Hearing Examiner, whose findings at best would have been recommendatory, are likewise a nullity and of no effect.

6. The Fact That the Sherman Act Has Been in Effect for 77 Years Gives These Appellees No Right To Violate It Now.

Appellees appear to claim some prescriptive right to violate the antitrust laws by virtue of the facts that the Sherman Act is 77 years old and this case has not come up before. Appellees made the same argument below. They now quote appellants' counsel, out of context, as having conceded below "that there is no case exactly like this in the past seventy-seven years." The answer to appellees' argument lies in the full statement of what appellants' counsel said in the court below (Tr. 6/2/67, pp. 31-33):

I think it is true that there is no case exactly like this in the past seventy-seven years.

However, last year the Supreme Court decided the Carnation case, which we cite in our brief [383 U.S. 213], and it held that the jurisdiction of the Maritime Commission was not coextensive with the jurisdiction of the Sherman Act.

No such decision had ever been made before and it could equally have been argued that the Supreme Court should dismiss the [Carnation] appeal because for seventy-six years [there had been] no precedent for this kind of case.

In the two famous antitrust cases that were decided in 1911, the United States v. Standard Oil Company

[221 U.S. 1] and American Tobacco Company v. the United States [221 U.S. 106], that broke up the oil trust and the tobacco trust, the same argument could have been made there. There is no precedent. For twenty-one years the antitrust laws have been in effect and there is no precedent for exactly this kind of thing.

The concept [urged by appellees] seems to be that the first time you come in with a specific set of facts, the court should say, this has never come up before, therefore you go free, but don't do it again. That, as I understand it, is not the law and never has been.

In closing argument below, appellants' counsel said (Tr. 6/2/67, pp. 72-73):

This seventy-seven-year business seems to be the key to the [appellees'] whole argument. I might say that in seventy-seven years there is no case which held that we have not set forth a cause of action. There is no case which says we have because the exact facts have not been before the Court. There is also no case which says we haven't.

The point is that no case involving these identical facts has ever been before the Court. We have presented in our brief a large number, maybe too many cases which we think are analogous and point in the direction that the Court should go.

How the above can be construed as the *concession* by counsel which is referred to at p. 22 of appellees' brief is beyond comprehension. Of course, no two antitrust cases are ever identical on their facts; and that is all the so-called *concession* conceded.

CONCLUSION

For the foregoing reasons and for those stated in appellants' main brief, the judgment below should be reversed.

Respectfully submitted,

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